No. 01-729-CFX Title: Delbert W. Smith and Bruce M. Botelho, Petitioners
v.
John Doe I, et al.

Docketed: November 28, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 21 2001	Petition for writ of certiorari filed. (Response due December 28, 2001)
	Dec 13 2001	Brief amici curiae of California, et al. filed.
	Dec 27 2001	Brief of respondents John Doe I, et al. in opposition filed.
	Jan 9 2002	DISTRIBUTED for Conference of February 15, 2002
	Feb 19 2002	Petition GRANTED. SET FOR ARGUMENT November 13, 2002. **********
	Mar 22 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including May 3, 2002.
	Apr 11 2002	Order further extending time to file the joint appendix and petitioners' brief on the merits to and including June 3, 2002.
	May 30 2002	Brief amici curiae of California, et al. filed.
	Jun 3 2002	Brief of petitioners Glenn G. Godfrey, et al. filed.
	Jun 3 2002	Joint appendix filed.
	Jun 3 2002	Brief amici curiae of Council of State Governments, et al. filed.
	Jun 3 2002	Motion of The Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae filed.
	Jun 3 2002	Brief amicus curiae of United States filed.
	Jun 12 2002	LODGING consisting of twenty sets of four documents submitted by counsel for amici, California, et al.
	Jun 17 2002	Motion of The Reporters Committee for Freedom of the Press for leave to file a brief as amicus curiae GRANTED.
	Jun 18 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 21 2002	Order extending time to file respondents' briefs on the merits to and including August 5, 2002.
	Jun 28 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jul 31 2002	Brief amici curiae of Office of Public Defender of New Jersey, et al. filed.
	Aug 1 2002	Brief amicus curiae of Massachusetts Committee for Public Counsel Services filed.
	Aug 1 2002	Motion of Public Defender of New Jersey, as amicus curiae, for leave to lodge documents under seal with redacted copies for the public record filed.
	Aug 5 2002	Brief of respondents John Doe I, Jane Doe, and John Doe II filed.
	Aug 5 2002	Brief amicus curiae of Public Defender Service for District of Columbia filed.

2 pp

Entry	Date	Proceedings and Orders
	Aug 5 2002	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Aug 5 2002	Brief amicus curiae of Electronic Privacy Information Center filed.
	Aug 5 2002	Motion of Citizens for Penal Reform, Inc., and Richard Jones for leave to file a brief as amici curiae filed.
	Aug 31 2002	CIRCULATED.
	Sep 4 2002	Reply brief of petitioners Glenn G. Godfrey, et al. filed.
	Sep 13 2002	Motion of respondents for divided argument filed.
	Sep 16 2002	Record filed.
	Sep 17 2002	Record filed.
	Oct 7 2002	Motion of Public Defender of New Jersey, as amicus curiae, for leave to lodge documents under seal with redacted copies for the public record DENIED.
	Oct 7 2002	Motion of Citizens for Penal Reform, Inc., and Richard Jones for leave to file a brief as amici curiae GRANTED.
	Nov 1 2002	Motion of respondents for divided argument DENIED.
	Nov 13 2002	ARGUED.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

RONALD O. OTTE and BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. § 12.63.010 *et seq.*, requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The department elected to publish the information on the Internet. Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the *Ex Post Facto* Clause of the United States Constitution?

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OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a) is reported at 259 F.3d 979. The initial opinion of the court of appeals (App. 33a) is reported at 248 F.3d 832. The orders of the district court (App. 69a, 118a) are unreported.

JURISDICTION

The court of appeals issued its initial decision on April 9, 2001. On July 24, 2001, and again on August 8, 2001, the court of appeals amended its decision. The court of appeals entered identical orders denying the state's petitions for rehearing *en banc* on August 23, 2001, and September 6, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, Section 10 of the Constitution provides: "No State shall . . . pass any . . . ex post facto law. . . ."

The Alaska sex offender registration law, Alaska Stat. §§ 12.63.010-12.63.100 and § 18.65.087, and pertinent Alaska regulations are reproduced in the Appendix (App. 125a).

STATEMENT OF THE CASE

A. Statutory Background

As of 1993, Alaska's rate of child sexual abuse was the highest in the nation and six times the national average; its rate of sexual assault was the second highest in the nation and had nearly doubled in the previous two years. *See Hearing on HB 69 before House State Affairs Committee*, 18th Alaska Legis., 1st Session (Feb. 2, 1993). In response to this crisis, Alaska's legislature in 1994 enacted the Alaska Sex Offender Registration Act.

When adopting the statute, the legislature announced that its purpose was to "protect[ ] the public from sex offenders." 1994 Alaska Sess. Laws ch. 41, § 1. In keeping with this remedial objective, the legislature required registration of sex offenders who had committed their offenses before the law's effective date. The only sex offenders who were exempt from registration were those who had only one felony conviction and who had been unconditionally discharged before July 1, 1984. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a).

The statute has two principal components. First, it requires persons convicted of sex offenses (such as child kidnapping, felony sexual assaults, sexual abuse of a minor, and distribution of child pornography) to register with the state. Alaska Stat. §§ 12.63.010 (registration requirements); 12.63.100(6) (sex offenses covered). Incarcerated sex offenders must register with the Department of Corrections; otherwise, sex offenders must initially register "in person" at the Alaska state trooper post or municipal police department. Alaska Stat. § 12.63.010(b).

Persons convicted of the most serious sex offenses must provide "written verification" of the registration information four times a year for life, while other sex offenders must do so once a year for 15 years. Alaska Stat. § 12.63.010(d).

Second, the statute provides that the registration information be made available to the public, thereby accomplishing its central objective. The legislation established a central registry for sex offender information, to be maintained by the Alaska Department of Public Safety. Alaska Stat. § 18.65.087(a). The department has exercised its authorized discretion by publishing the information on the Internet, thereby facilitating public access to it.

B. Proceedings Below

Among the sex offenders who fell within the scope of the new law were John Doe I and John Doe II. Doe I had sexually abused his daughter for two years while she was between the ages of nine and eleven. For this crime, Doe I had been sentenced to eight years' imprisonment. He was released from prison in 1990. App. 4a. John Doe II had sexually abused his daughter when she was 14 years old. He, too, had been sentenced to eight years' imprisonment and was released from prison in 1990. *Id.*

The Does filed a civil suit in federal district court, arguing, among many other things, that the sex offender registration statute violated the *Ex Post Facto* Clause as applied to persons whose offenses were committed before the statute's effective date. In 1999, the district court

granted summary judgment in favor of the state on all of the Does' claims. App. 69a, 118a.

The Ninth Circuit Court of Appeals reversed, holding that the statute violates the *Ex Post Facto* Clause as applied to offenders who were convicted before the statute's effective date. In addressing the pivotal question whether Alaska's statute is punitive or remedial, the panel acknowledged (in both its initial and amended opinions) that if the legislature intended the statute to be civil in nature, the party challenging the statute must provide "the clearest proof" that the statutory scheme is so punitive that it should nevertheless "be considered to constitute punishment." App. 8a, 40a (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

In its original opinion, the court of appeals concluded that it was unclear whether the Alaska legislature intended the statute to be civil or criminal in nature. The court therefore declined to require the Does to provide the "clearest proof" and instead applied "ordinary and customary legal standards" to determine whether the effect of the Alaska statute is punitive. App. 46a-47a. After reviewing the seven factors identified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Ninth Circuit found that "the Act's effect is sufficiently punitive" to be "classified as punishment for *Ex Post Facto* Clause purposes." App. 64a.

In concluding that the Alaska statute is punitive, the court of appeals relied in part on the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. App. 39a, 48a, 55a-56a, 63a-64a. The state

filed a petition for rehearing *en banc* which pointed out that Alaska's statute does not, in fact, require any offender to visit the police station "in person" to verify his registration information; the statute requires only "written verification." (The court read the statute as it did based entirely on an answer given by the state's attorney to a question posed at oral argument. App. 7a n.4.) The petition also challenged the court's view that the legislature's "intent" was ambiguous. The state observed that the Washington sexual offender registration statute deemed "remedial" in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom., Stearns v. Gregoire*, 523 U.S. 1007 (1998), shared the very structural features that were cited by the *Doe* court as proof of the ambiguity of the Alaska legislature's intent.

On August 8, 2001, the court of appeals issued an amended opinion, which acknowledged that Alaska's statute was "remarkably similar" in structure to the Washington law. The court accordingly held that the intent of the Alaska law is non-punitive, and that only the "clearest proof" of punitive effect could negate that intent. App. 12a-13a. The court nonetheless reached the same result as when it had declined to apply the "clearest proof" standard. (Indeed, the portion of the opinion applying the seven *Mendoza-Martinez* factors is copied from the original opinion almost verbatim.)

The court agreed that several factors militated in favor of finding the statute non-punitive. Historically, "sex offender registration and notification provisions have not been regarded as punishment"; the statute does not contain a *mens rea* requirement; and the statute has the non-punitive purpose of protecting public safety.

App. 18a-19a, 23a, 29a-30a. The court found, however, that several other factors not only outweighed those three factors, but also provided the "clearest proof" of punitive effect.

The court stated that "[t]wo factors, particularly, demonstrate" the punitive effect of the statute: the substantial disability it imposes and its purported excessiveness. App. 28a-29a. Regarding the former, the court (again) pointed to the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. The court also was troubled by the state's decision to post registration information on the Internet, which "exposes all registrants to world-wide obloquy and ostracism." *Id.* The court found the statute excessive because it relies on the offender's convictions as a conclusive measure of the risk posed by the offender, rather than requiring individualized assessments of risk. Thus, information on all sex offenders is "available world-wide on the internet without any restriction." App. 24a.

The state again petitioned for rehearing *en banc*, arguing, among other things, that the panel had erred by persisting in relying on the misstatement of the state's attorney. The petition for rehearing was denied. App. 123a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Erodes the States' Ability to Protect the Public From Sex Offenders

Every state in the nation has enacted a version of "Megan's Law," which requires convicted sex offenders

to register with the state and provides for the disclosure to the public of that information.[1]

The general objective of these laws is to limit recidivism by alerting the public to potential threats to public safety posed by convicted sex offenders. The universal adoption of sex offender registration laws reflects the important interests they serve and the states' belief in their efficacy.

These state registration and notification laws vary widely, both in what they require of offenders and in the means by which they make the registry's information available. In spite of the formal variation among state laws, the key features of Alaska's statute are neither unique to Alaska nor peripheral to the core objective of disseminating information about offenders.

Thus, Alaska is not alone in relying on prior convictions as the exclusive measure of the future risk posed by an offender. One recent survey of state laws identified 19 states that "require[] all offenders convicted of certain child or sex offenses specified by the legislature to register and undergo notification, without regard for risk of individual offender recidivism." Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603

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[1] *See Doe v. Dep't of Public Safety ex rel. Lee*, Nos. 01-7600, 01-7561, 2001 WL 1336037 (2d Cir. Oct. 19, 2001) (citing *Roe v. Farwell*, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1172 (1999)).

(2000). Among these states are Illinois, Michigan, and Virginia.[2]

Nor is Alaska alone in using the Internet to facilitate public access to the registry. States that make sex offender information available on the Internet include Delaware, Georgia, Illinois, Kentucky, Michigan, Nebraska, North Carolina, South Carolina, Virginia, and West Virginia.[3]

And the number of states that make this information available on the Internet appears to be growing. *See* Note, *Megan's Law: Analysis on Whether It Is Constitutional to Notify the Public of Sex Offenders via the Internet*, J. Marshall J. Computer & Info. L. 1133, 1137 (1999) (identifying eight states that used the Internet for notification as of 1998).

By holding Alaska's version unconstitutional as applied to persons convicted prior to enactment, the Ninth Circuit has significantly restricted the means by which states in the Ninth Circuit, and possibly across the country, can enforce their laws.

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[2] Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603 n.39 (2000); *see also, e.g.*, 730 Ill. Comp. Stat. § 150/2 *et seq.*; Mich. Comp. Laws § 28.722 *et seq.*; Va. Code § 19.2-298.1.

[3] These states' sex offender registry sites are, respectively: <http://www.state.de.us/dsp/sexoff/index. htm>; <http://www.ganet.org/gbi/disclaim.html>; <http://samnet.isp.state.il.us/ispso2/sex_offenders/index.asp>; <http://kspsor.state.ky.us>; <http://www.mipsor.state.mi.us>; <http://www.nsp.state.ne.us/sor>; <http://sbi.jus.state.nc.us/sor>; <http://www.scattorneygeneral.com/public/registry.html>; <http://sex-offender.vsp.state.va.us>; <http://www.wvstatepolice.com/sexoff>.

II. The Decision Below Conflicts with a Decision of the Tenth Circuit

The Ninth Circuit's decision directly conflicts with the decision of the Tenth Circuit in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, the Tenth Circuit considered a Utah sex offender registration statute that shares the two features principally relied upon by the Ninth Circuit as evidence that Alaska's statute is punitive. Like Alaska's statute, Utah's statute requires everyone convicted of a sex offense to register; it contains no mechanism for individualized assessment of risk. Utah Code § 77-27-21.5. And, like Alaska, Utah makes information from the sex offender registry available to the public on the Internet. *Femedeer*, 227 F.3d at 1247. As the court explained, in Utah, "[a]ccess to this information is not controlled in any way; anyone with access to the Internet can access all of the registry information, regardless of their place of residence or any other specific need." *Id.* But the Tenth Circuit held that neither of these features made the Utah statute punitive.

With respect to the first feature – the statute's lack of any mechanism for individualized risk assessment – the Tenth Circuit acknowledged that "[o]ther states have chosen to incorporate more defined risk assessment mechanisms into their sex offender registry and notification schemes." *Femedeer*, 227 F.3d at 1253. But the court said this feature of the Utah statute did not make the statute excessive in relation to its legitimate purpose. Rather, a statute's failure to "achieve[] a perfect fit between ends and means" does not necessarily make the statute punitive. *Id.*

With respect to the second feature – the state's use of the Internet to make sex offender information available to the public – the Tenth Circuit observed that "[d]issemination of information about criminal activity . . . has never been regarded as punishment when it is done in furtherance of a legitimate governmental interest." *Femedeer*, 227 F.3d at 1251. The use of the Internet, ruled the court, "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." *Id.* The court also rejected the notion that Internet publication imposes "excessive costs" on the offenders: "the farther removed one is from a sex offender's community and from Utah generally, the less likely one will be to have an interest in accessing this particular registry." *Id.* at 1253. In sum, the benefits of Internet notification "justif[y] the means employed." *Id.*

All told, the Tenth Circuit concluded that the evidence that Utah's statute was punitive "does not come even close to the 'clearest proof' necessary to overcome the civil intent of Utah's legislature." *Femedeer*, 227 F.3d at 1253. Not surprisingly, then, the Ninth Circuit explicitly acknowledged its differences with the Tenth Circuit. After pointing out a minor difference between Utah's notification mechanism and Alaska's notification mechanism, the Ninth Circuit said: "In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*." App. 25a n.11.[4]

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[4] The Alaska and Utah statutes differ in that Utah's statute requires registration by those "found not guilty by reason of insanity" of sex offenses, while Alaska's does not. *Compare* Utah

Of course, the Ninth Circuit also relied on a third factor in declaring Alaska's law punitive: the supposed requirement that some sex offenders re-register "in person" at the police station four times a year. As noted above, however, Alaska's statute does not in fact require "in person" re-registration. Under the Alaska statute, the offender must register "in person" just once, when he is released from prison or enters the state. *See* Alaska Stat. § 12.63.010(b) (requiring registration "in person" at the nearest police station). After this initial registration, the offender is required only to provide quarterly or annual "written verification" of his registration information. Alaska Stat. § 12.63.010(d). *See also* 13 Alaska Admin. Code §§ 09.025, 09.030 (offender may be required to visit police station every five years to be re-photographed).[5]

Stat. § 77-27-21.5(1)(d)(iii) *with* Alaska Stat. § 12.63.100(3). The Ninth Circuit discussed this feature of the Alaska statute briefly, stating "this factor also provides support for the conclusion that the Act's effect is punitive." App. 23a. Even a cursory reading of the Ninth Circuit's opinion makes clear that this one difference between the statutes was not responsible for the different outcomes. And as the Ninth Circuit acknowledged, in Alaska, the defense of insanity is available only to the very rare offender who is unable to appreciate the basic "nature and quality" of his conduct, *e.g.*, is unable to appreciate that he engaged in sexual relations. *Id.* at 22a n.9. It is difficult to see how the Alaska statute's failure to cover sex offenders fitting within that small category makes the statute more punitive.

[5] The Ninth Circuit's decision in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), also conflicts with the decision by Alaska's intermediate appellate court in *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999). In *Patterson*, the court concluded that Alaska's statute did not violate the *Ex Post Facto* Clause. *Id.* at 1011-13. The Alaska Supreme Court is presently considering the *ex post facto* issue in a quartet of cases: *State v. Doe*, No. S-8972;

III. The Ninth Circuit Erred By Far Too Readily Disregarding the Legislature's Remedial Intent

The Ninth Circuit simply was wrong in concluding that Alaska's statute was dramatically different from, and dramatically more "punitive" than, sex offender registration statutes upheld in cases like *Russell*, 124 F.3d at 1087; *Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); and *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997), *cert. denied sub nom., Verniero v. W.P.*, 522 U.S. 1110 (1998). The factors relied upon by the Ninth Circuit for finding the Alaska statute punitive fall far short of overcoming the strong contrary presumption created by the legislature's intent to enact a remedial civil scheme.

Elmore v. State, No. S-9495; *Martin v. State*, No. S-10139; and *Doe v. State*, No. S-10338. This Court should not wait for the Alaska Supreme Court to decide these cases. First, giving the Alaska Supreme Court time to decide its cases will not materially aid this Court in resolving the issues presented in this petition. Though this Court would be bound by a state supreme court's construction of a state statute, the Court will not be bound by a state supreme court's conclusion as to whether the statute complies with federal constitutional law. *See O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Whether the statute requires quarterly in-person verification is not even an issue in the state cases. The Alaska statute is so clear and the Ninth Circuit's reading of the statute is so obviously at odds with the text that this Court should grant the petition at this time and then decide the constitutional issue. Second, the decisions by the Alaska Supreme Court, regardless of their outcomes, will not resolve the conflict between the Ninth and Tenth Circuits.

First, the Alaska legislature's decision to rely on past convictions as evidence of future dangerousness does not make Alaska's statute punitive. A wide array of remedial, civil statutes impose consequences on offenders exclusively on the basis of a past conviction, without any individualized risk assessment. Two obvious examples are statutes prohibiting the possession of firearms by convicted felons, *see, e.g.*, Alaska Stat. § 11.61.200, and statutes debarring convicted felons from the practice of medicine. *See Hawker v. New York*, 170 U.S. 189 (1898) (holding that use of felony conviction as conclusive evidence of unfitness to practice medicine not punitive).

Second, Alaska's use of the Internet to provide public access to information contained in the sex offender registry does not make Alaska's law punitive. The availability of sex offender information "world-wide" does not, as the Ninth Circuit ruled, make the statute "excessive in relation to the alternative purposes assigned." App. 23a-24a, 27a. Alaska makes the information available worldwide only because the best vehicle for providing *local* access – the worldwide web – necessarily facilitated wider access as well. An Internet provider does not have the option of providing content only to users whose computers are located within a particular geographical area. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 853-54 (1997). Not surprisingly, state and local governments routinely make information of purely local interest available "world-wide" on the Internet.

Further, there is no reason to suppose that the availability of sex offender information "world-wide" will have a significant impact on any sex offender. It is difficult to understand why anyone in, say, Florida or Brazil

would have an interest in the Alaska sex offender registry.

The court of appeals also was wrong to express concern about the ease with which local residents could access information through the Internet. *See* App. 14a, 16a, 24a. The very point of sex offender registration is to provide local residents with information necessary to enable them to protect themselves and their children from offenders. It does not make sense both to acknowledge the importance of this purpose and at the same time to argue that the efficient accomplishment of the purpose makes the sex offender registration act punitive.

In one very important sense, Internet notification is far less intrusive than vehicles chosen by some other states for facilitating public access to sex offender material. Though the state's use of the Internet makes the sex offender information readily available to those who pursue it, it makes the information available to no one else. As this Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. at 854, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." Of pornography, the Court said, "[t]hough such material is widely available, users seldom encounter such content accidentally." *Id.* The same is true of sex offender information. This makes Internet publication less intrusive than, say, mailing an information packet concerning the sex offender to everyone who lives within a certain distance of him. *See, e.g., E.B. v. Verniero*, 119 F.3d at 1088.

Finally, the Ninth Circuit's adoption of a verifiably false interpretation of Alaska's law, in reliance on a mistatement at oral argument, was manifestly in error. This Court long has recognized that questions of law should not be resolved on the basis of a stipulation of the parties. *See, e.g., Young v. United States*, 315 U.S. 257, 259 (1942); *Estate of Sanford v. Comm'r of Internal Revenue*, 308 U.S. 39, 50-51 (1939); *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281 (1917). Two factors make the court's reliance on the state's "concession" particularly inapt in this case. First, the state's "concession" obviously was not a product of deliberation; the "concession" was made at oral argument, in response to a judge's question concerning an aspect of the law that had not been addressed in the parties' briefs. Second, the state's error was brought to the court's attention *before* the court undertook the critical task of determining whether the statute's "effects" provided "the clearest proof" of a punitive end.

The requirement that some offenders provide quarterly *written* verification of their whereabouts is not so onerous as to make the act punitive. Quarterly reporting requirements are relatively common; perhaps the most well-known is the requirement that persons who are self-employed pay "estimated taxes" every three months. *See* 26 U.S.C. § 6654(c). Indeed, this Court has upheld quarterly reporting requirements even when the requirements affect the exercise of constitutional rights. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 900-01 (1992) (upholding statute that required abortion facilities to "file quarterly reports showing the number of abortions performed broken down by trimester"); *Buckley v. Valeo*, 424

U.S. 1, 62-64 (1976) (upholding statute that required candidates for public office to file quarterly reports identifying the sources of campaign contributions).

All told, the Ninth Circuit committed manifest error when it held that Alaska's sex offender registration statute violates the *Ex Post Facto* Clause. Given the importance of the issue and the conflict among the circuits that the Ninth Circuit's decision creates, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CYNTHIA M. COOPER
Deputy Attorney General

November 21, 2001

No. _____

In The

Supreme Court of the United States

RONALD O. OTTE and BRUCE M. BOTELO,
Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Argued and Submitted: August 1, 2000 –
Anchorage, Alaska
Opinion Filed: April 9, 2001
Amended July 24, 2001
Amended August 8, 2001]

Before: D.W. NELSON, REINHARDT and THOMAS, Circuit Judges

Opinion by Judge REINHARDT

REINHARDT, Circuit Judge:

This case involves an extremely sensitive and difficult question, both from a social and legal standpoint. How may society deal with convicted sex offenders *after* they have been punished for their crimes? How can society protect itself against future offenses and at the same time safeguard the constitutional rights of persons who have fully paid the price imposed by law for their crimes? The issues treated in the Alaska Sex Offender Registration Act we consider here differ only in degree from a host of other issues the citizens of this country regularly

face in trying to resolve the inherent tensions between safety and freedom that exist in any democracy.

As it turns out, we can decide the case before us without having to resolve the most fundamental question posed by the Alaska statute: that is, in light of the fundamental liberty interest protected by the Due Process Clause, may rehabilitation, or a judicial determination of lack of future risk, be wholly ignored when imposing restrictive requirements and obligations on persons who have committed a sexual offense and been fully punished for their crimes? Instead, we base our decision on a far narrower constitutional provision, the Ex Post Facto Clause.

The plaintiffs in this action are convicted sex offenders who have completed their sentences. They claim that Alaska's sex offender registration and notification statute, enacted after their convictions, both constitutes an ex post facto law and violates their due process rights. U.S. Const. Article I, § 10; Amend. 14. Because we conclude that, as to defendants whose crimes were committed before its enactment, the Alaska statute violates the Ex Post Facto Clause, we do not resolve the question whether it also violates the Due Process Clause.

The Ex Post Facto Clause serves two purposes: it requires fair notice, and, particularly relevant to the Alaska statute, it acts to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L.Ed. 162 (1810) (the Ex Post Facto Clause checks "the violent acts which might grow out of the feelings of the moment"). Convicted sex

offenders have good reason to fear vindictive legislation. Their crimes are viewed by society as an affront to the institution of the family. More important, many of us fear that upon their release, sex offenders will prey on our children and those of our neighbors.

The Ex Post Facto Clause expresses our commitment to constrain the manner in which legislatures can address intense fears of the type evoked by the return to the community of convicted sex offenders. However, its check on legislative power is quite limited – it merely requires that punishment be prospectively imposed. Because the Alaska Sex Offender Registration Act does not comply with this minimal protection, we hold that it may not be applied to persons whose crimes were committed before its enactment.

I. BACKGROUND

A. *Factual background*

On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act (sometimes referred to in this opinion as "the Act" or "the Alaska statute"), which requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of information in the sex offender registry. 1994 Alaska Sess. Laws 41. In its implementing regulations, Alaska provides that it will, in all cases, post the information from the registry for public viewing in print or electronic form, so that it can be used by "any person" "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000). Upon passage of the Act, two men required to register, John Doe I and John Doe II, as well as John Doe I's wife,

immediately brought a 42 U.S.C. § 1983 action against the state commissioner for public safety and state attorney general to enjoin its enforcement.

In 1985, nine years before the Alaska statute was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter for two years while she was between the ages of nine and eleven. He was sentenced to twelve years incarceration, of which four years were suspended; he was released from prison in 1990. After being released, Doe I was granted custody of his daughter, based on a court's determination that he had been successfully rehabilitated. In making its determination, the court relied, in part, on the findings of psychiatric evaluations concluding that Doe I has "a very low risk of re-offending" and is "not a pedophile." Also, since his release, Doe I married Jane Doe, who was aware of Doe I's conviction for a sex offense.

Jane Doe is a registered nurse in Anchorage, and is well known in the medical community there. She alleges that disclosure of her husband's criminal background will "undermine [her] professional relationships," and her ability to obtain and care for patients.

The third plaintiff, John Doe II, entered a plea of nolo contendere on April 8, 1984 to one count of sexual abuse of a minor for sexual abuse of a 14-year-old child. He was sentenced to eight years in prison, released in 1990, and subsequently completed a two-year program for the treatment of sex offenders.

B. *Prior Proceedings*

The plaintiffs filed a complaint in the district court claiming that the Alaska statute violates their federal and state constitutional rights and sought leave to proceed under pseudonyms. The district judge granted a preliminary injunction requiring the plaintiffs to register under the act but prohibiting public disclosure of the registration information; at the same time he denied their request to proceed under pseudonyms. *See Rowe v. Burton*, 884 F. Supp. 1372, 1388 (D. Alaska 1994).[1] The plaintiffs appealed the denial of their use of pseudonyms, and we dismissed the appeal because no final judgment had been entered. On remand, the district judge dismissed the complaint when the plaintiffs would not amend it to include their real names. The plaintiffs appealed the dismissal, and this court reversed, holding that the plaintiffs could proceed under pseudonyms.

With the nomenclature issue resolved, the parties in 1998 filed cross-motions for summary judgment. A different district judge granted the state's motion, and this appeal followed.[2]

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[1] When the complaint was filed, Doe I used the pseudonym "James Rowe." However, the court subsequently changed his pseudonym to "John Doe I" after an individual named James Rowe complained that he was suffering ill effects from Doe's use of the name in this matter.

[2] We offer no comment on the tortured course of the proceedings in this case or the fact that it is now seven years since the Alaska statute was enacted. We observe only that we now add to this judicial odyssey by deciding the case on the narrower of the two constitutional grounds, as that affords appellants all the relief they seek. The question whether the

C. *The Alaska Sex Offender Registration Act*

The Alaska Sex Offender Registration Act was enacted at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a "crisis." Legislators heard testimony that Alaska's rate of child sexual abuse was the highest in the country, that one-fourth of Alaska's prison inmates were incarcerated for sexual offenses, and that in 1993, one hundred sex offenders were scheduled for release from prison. On May 12, 1994, Alaska enacted its sex offender registration statute, and subsequently amended it in 1998 and 1999. 1998 Alaska Sess. Laws 81 & 106 (adding crimes to the list of "sex offenses" requiring registration); 1999 Alaska Sess. Laws 54 (defining "conviction").

The Alaska statute has two main components: it requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public. The registration provisions require persons convicted of a broad range of offenses against children and adults to register in person with local police authorities. Such offenses include, for example, sexual assault and possession of child pornography.[3] Alaska Stat. § 12.63.100(1)(B).

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statute offends the rights of persons whose crimes were committed after its enactment will have to wait for another day.

[3] Other offenses include child kidnaping, felony sexual assaults, sexual abuse of a minor, incest, unlawful exploitation of a minor, promoting or forcing a minor to engage in prostitution, distribution of child pornography, felony indecent exposure, and misdemeanor indecent exposure where the victim is under 16 and the defendant has a prior conviction for certain offenses. Alaska Stat. § 12.63.100.

Registrants must be photographed, provide fingerprints, and provide the following information: name, date of birth, address, place of employment, and information about the conviction (specifically the crime, date of conviction and place of conviction). Alaska Stat. § 12.63.010. Those convicted of "aggravated" sex offenses must register in person at their local police stations four times each year for life; those convicted of other sex offenses must register in person annually for fifteen years. Alaska Stat. § 12.63.020.[4]

Information collected under the Alaska Sex Offender Registration Act is forwarded to the Alaska Department of Public Safety, which maintains a central registry. Alaska Stat. § 18.65.087. The parties agree that the Department of Public Safety has published the collected information on its internet website, making it readily available to all persons world-wide. The information on the website, which can be searched by name, partial address, zip code or city, includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner "Registered Sex Offender."

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[4] The Alaska statute, on its face, does not clearly specify that these registrations must be made in person at local police stations. However, the government represented at oral argument that periodic in-person registration at local police stations is required by the Act. When specifically asked whether registrants must "go to the police station" for their annual or quarterly registrations, the government answered "under the current law, yes."

II. EX POST FACTO CLAIM

The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 1 L.Ed. 648 (1798). There is no question that the Alaska statute, by its terms, applies to the plaintiffs even though their crimes were committed before its enactment. However, the question when considering whether a retroactively applicable statute is subject to the constraints of the Ex Post Facto Clause is not whether it "produces some ambiguous sort of 'disadvantage,' . . . but . . . whether [it] . . . increases the penalty by which a crime is punishable." *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.

Whether a statute should be classified as imposing punishment involves a two-step inquiry. We must first consider whether, when enacting the Act, the Alaska legislature "indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). If we conclude that the legislature's intent was punitive, our inquiry is at an end. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). If we conclude that the legislature did not intend the statute to be considered punitive, or that its intent is ambiguous, then we must inquire whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward*, 448 U.S. at 249, 100 S.Ct. 2636. This two-step inquiry is known as the

"intent-effects test."[5] *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir. 1997).

In other Ex Post Facto challenges to state sex offender registration and notification laws, some courts of appeals have analyzed separately the registration and notification provisions while others have looked to the statute as a whole. *Compare Russell*, 124 F.3d at 1087, 1089 (separately considering the registration and notification provisions); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (same) *with Cutshall v. Sundquist*, 193 F.3d 466, 473-76 (6th Cir. 1999) (considering registration and notification provisions together). The Alaska legislature enacted the Alaska statute as a single piece of legislation, and the notification and registration provisions operate in tandem. Neither the structure of the statute nor the excerpts of the legislative debate included in the record indicate that the provisions were viewed as serving separate purposes. Nor does the state suggest on this appeal that the provisions should be treated separately for purposes of our constitutional analysis. Moreover, an Alaska intermediate appellate court recently considered the statute as a whole when deciding an Ex Post Facto challenge. *See Patterson v. Alaska*, 985 P.2d 1007, 1011-13 (Alaska Ct. App.1999).

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[5] The test is somewhat confusing, because the "effects" prong includes an exploration into both the effects of the statute and its actual purpose. The legislature's purpose is, of course, necessarily considered in the examination conducted under the first prong (the intent prong) of the test.

After reviewing the structure of the statute and its legislative history, we agree with the Alaska court that the proper approach is to analyze the statute as a whole.[6]

A. *Intent of the Alaska Sex Offender Registration Act*

To determine the legislature's intent when enacting the Alaska Sex Offender Registration Act, we consider the body's declared purpose, the structure of the statute, and its design. *Russell*, 124 F.3d at 1087. Section 1 of the Alaska statute states:

"The legislature finds that

(1) sex offenders pose a high risk of reoffending after release from custody;

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[6] *Patterson* concluded that neither the intent nor the effects of the Alaska statute were punitive. *Patterson*, 985 P.2d at 1013. Determining "whether a particular [statute] is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248, 100 S.Ct. 2636. While we regard as "authoritative" the construction of a statute rendered by the state's highest court, *Russell*, 124 F.3d at 1090, we are *not* obligated to adopt that court's legal conclusion with regard to whether a legislature's purpose in enacting a statute is to punish. *Kansas v. Hendricks*, 521 U.S. 346, 365, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In other words, we defer to a state highest court's determination concerning what the statute means, but we determine independently whether that meaning renders a statute punitive or not. Of course, we are not obligated to accept the *Patterson* court's construction of the Alaska statute because *Patterson* is not a decision of the Alaska Supreme Court. While we find some of its analysis persuasive, we ultimately reach the opposite conclusion as to whether, for Ex Post Facto purposes, the statute should be considered punitive.

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety."

1994 Alaska Sess. Laws 41, § 1.

The court in *Patterson* held that these findings demonstrate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information, and we agree. *Patterson*, 985 P.2d at 1011 (findings make clear that legislature viewed "recidivism of sex offenders [as] a problem," and sought to address the problem through "the release of certain information"). Furthermore, the circumstances in which the legislation was enacted – it was passed amid popular fear about the *release* of large numbers of sex offenders into the community as a means for members of the community to protect themselves – supports the conclusion that the legislature did not intend the Act to be punitive. In light of the legislative findings and history, we conclude that the legislature acted with a non-punitive intent.

The structure of the Act does not cause us to conclude otherwise, because it is remarkably similar to the Washington sex offender registration and notification statute that we found to be non-punitive in *Russell* (although the substance of these statutes is significantly different). Although the registration provision in the

Alaska statute is codified in the state's criminal code, rather than in its civil code, *see* Alaska Stat. § 12.63.010 (part of Title 12 of the Alaska Code, labeled "Criminal Procedure"), such is also the case with respect to the Washington statute. *See* Wash. Rev. Code § 9A.44.130 (part of Title 9A of the Washington Revised Code, labeled "Washington Criminal Code").

In light of *Russell* and the Alaska Act's legislative findings, we conclude that the legislative intent of the Act is non-punitive. Thus, we now turn to the "effects" prong to determine whether, notwithstanding the legislative intent, the statute should be treated as punitive for Ex Post Facto Clause purposes.

B. *The Alaska Statute's Punitive Effect*

When considering a statute's effect, we rely on an analysis of seven factors set forth by the Supreme Court in *Mendoza-Martinez*. *Russell*, 124 F.3d at 1087. They are:

1) whether the sanction involves an affirmative disability or restraint;

2) whether it has historically been regarded as a punishment;

3) whether it comes into play only on a finding of scienter;

4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5) whether the behavior to which it applies is already a crime;

6) whether an alternative purpose to which it may rationally be connected is assignable to it; and

7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. 554.

We may "reject the legislature's manifest intent" and treat a statute as punitive "only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention." *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (internal quotations omitted); *Russell*, 124 F.3d at 1087. We applied these factors in *Russell* in order to determine whether Washington's narrowly drawn and strictly limited sex offender registration statute violated the Ex Post Facto Clause, and we held that it did not. *Russell*, 124 F.3d at 1089, 1093. Here, the application of the seven factors leads us to the conclusion that Alaska's statute, which is far broader and imposes far greater burdens on sex offenders than Washington's, is so punitive in its effect as to offend the Ex Post Facto Clause.

1. *Affirmative disability or restraint*

The Alaska Sex Offender Registration Act imposes an affirmative disability on the plaintiffs. First, its registration provisions impose a significant affirmative disability by subjecting offenders to onerous conditions that in some respects are similar to probation or supervised release. Like Washington's sex offender registration statute, Alaska's requires offenders being released from confinement to register. Alaska Code § 12.63.010(a); *Russell*,

124 F.3d at 1082. However, unlike the Washington statute, Alaska's requires sex offenders such as the plaintiffs to re-register at police stations four times each year every year of their lives. Alaska Code § 12.63.010(d). Moreover, in order to do so, they must appear in person at a police station on each occasion, and provide, under oath, a wide variety of personal information, including address, anticipated change of address, employer address, vehicle description, and information concerning mental health treatment for any "mental abnormality or personality disorder." § 12.63.010(b).

In *Russell*, we concluded that Washington's registration provisions did not impose an affirmative disability or restraint. *Russell*, 124 F.3d at 1088-89. However, as the state acknowledges, Alaska's registration requirement is vastly more burdensome than the one-time registration requirement at issue in *Russell*. We held in *Russell* that Washington's "simple registration" provision, involving a one-time only registration (except when changing one's address), does not work an affirmative disability or restraint. *Russell*, 124 F.3d at 1082, 1088. In part because Alaska's registration provision is far more onerous, we reach a different conclusion here.

Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from

the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

In reviewing a sex offender law that authorized public inspection of sex offender records at police departments and permitted newspapers or others to disseminate the information, the Kansas Supreme Court concluded that the law imposed a disability because "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). Where the impact is substantially less severe, however, the disability is not such as to warrant a finding that the statute is punitive. Such was the conclusion in *Cutshall*, 193 F.3d at 471, where a Tennessee statute limited disclosure of information to the amount "deemed necessary . . . to protect the public concerning a specific sexual offender," and in *Pataki*, 120 F.3d at 1269-70, where a New York act permitted such disclosure only on the basis of an individualized assessment of the risk of recidivism. Alaska's system of posting all sex offenders' information on the internet is far closer to the statutory scheme in *Myers* and, in fact, is likely to have a far greater impact on offenders. Because the internet is much more accessible to the public than records at police departments, the obloquy and scorn noted in *Myers* are more certain to result.

A statute also may be considered non-punitive where the specific disability is narrow. In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Supreme Court held that a sanction of occupational debarment" from the banking industry for those found to have misappropriated bank funds is not an "affirmative

disability or restraint" because the disability is severely limited. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. In contrast, in the present case, the procedures employed under the Alaska statute are likely to make the plaintiffs *completely* unemployable. Alaska publishes the names and addresses of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment. By doing so, it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders. This disability is far more substantial than the one at issue in *Hudson*, which merely involved debarment from a single profession. Indeed, the breadth of the impact of the Alaska statute provides strong evidence that the statute's effect is punitive. *See Myers*, 923 P.2d at 1041 (sex offender statute that permits public disclosure of offender's employment information imposes an affirmative disability).

The state argues that *Russell* compels the conclusion that the Alaska statute's notification provisions do not impose an affirmative disability. As noted earlier, however, *Russell* involved a statute with a far more limited notification provision. The Washington statute we considered in *Russell* authorizes release of information only when it has been determined that the specific offender poses a risk of reoffending, and even then, the information disclosed is much more limited than the information Alaska discloses. *Russell*, 124 F.3d at 1082. Furthermore, under the Washington act, disclosure is limited to a narrow geographic area within the state of Washington,

whereas here the notification of a defendant's lurid past is world-wide. *Id.* Moreover, when considering whether Washington's limited notification provisions posed an affirmative disability, we "actively weigh[ed]" the harsh results of the community notification provisions, including "humiliation, ostracism, public opprobrium, and the loss of job opportunities," but decided that the disability was not "so egregious" as to prevent the court from concluding that the statute was regulatory. *Russell*, 124 F.3d at 1092.

In *Russell*, therefore, we *did* determine that the notification provisions imposed an affirmative disability. We made this clear by "actively weighing" the statute's consequences along with the other *Mendoza-Martinez* factors. We ultimately concluded, however, that the disability was insufficient to overcome the clear legislative intent that the statute not be punitive.

Considered as a whole, the Alaska statute's registration and notification provisions impose substantial disabilities on the plaintiffs. Both the registration and notification provisions are far more burdensome than the provisions we considered in *Russell*. When the applicable provisions of the Alaska statute are considered together, the first *Mendoza-Martinez* factor clearly favors treating the Act as punitive.

2. *Historical treatment*

Sex offender registration and notification statutes are of fairly recent origin.[7] Other courts considering such statutes consider whether they are analogous to historical shaming punishments. In *Russell*, we concluded that the provisions of the Washington statute were not. *Russell*, 124 F.3d at 1092. We reach the same conclusion here. Accordingly, the second factor favors treating the statute as non-punitive.

3. *Finding of scienter*

The third *Mendoza-Martinez* factor is whether the statute's provisions come into effect only upon a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. A defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter. However, some of the offenses that subject an offender to the Act's requirements are "strict liability" offenses that can be committed whether or not the defendant is aware of certain facts that make his conduct criminal. For example, conviction for sexual abuse of a minor under 13 years of age does not require any showing that the defendant knows that his victim is under that age. Alaska Stat. §§ 11.41.434; 11.41.445(b).

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[7] The first sex offender community notification statute was enacted by Washington in 1990. Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 334-35 (1998). After the 1994 killing of Megan Kanka in New Jersey, such statutes became widespread. *Id.*

Our inquiry when considering this factor is whether the Act's requirements may be imposed *only* upon a finding of scienter. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. While the Alaska statute generally requires a finding of scienter, its provisions do not become applicable *only* in such circumstance. Accordingly, like the second *Mendoza-Martinez* factor, this factor supports the conclusion that the Act is not punitive.

4. *Traditional aims of punishment*

When a statute promotes the traditional aims of punishment – retribution and deterrence, its effect is more likely to be considered punitive. *Id.* This court has previously held that Washington's statute, which is substantially less onerous than Alaska's, "may implicate deterrence," *Russell*, 124 F.3d at 1091, and the *Patterson* court reached the same conclusion with regard to the Alaska statute. *Patterson*, 985 P.2d at 1012. Accordingly, we conclude that the Act may provide a measure of deterrence; the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders.

While the Alaska statute may have some deterrent effect, it even more directly serves the other traditional aim of punishment – retribution. It is primarily this objective that causes us to weigh the fourth factor on the side of finding the Act punitive. The Act's onerous registration obligations appear to be inherently retributive. The duty of sex offenders to report quarterly to their local police stations may be analogized to the duty imposed in

a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release. Such obligations are part of the punishment meted out through a defendant's criminal sentence. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995).

Moreover, the duration of the Act's requirements provides additional support for the conclusion that retribution is an objective of the Act. For offenses that are not classified as aggravated, the Act requires registration for 15 years.[8] Alaska Stat. § 12.63.020(a). However, for each year that an offender fails to comply with the registration requirements, the 15 year period is extended by an additional year. Alaska Stat. § 12.63.020(a)(2). The relationship between failing to renew the registration annually and the statute's non-punitive public safety objective – preventing recidivism – seems tenuous. On the other hand, if registration is punitive, requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years) achieves a statutory purpose, because the penalty for the sex offense includes the requirement of annual in-person registration 15 separate times.

Finally, that the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed, indicates that the

[8] When an offender is no longer required to register, the state removes his name from the registry, and therefore his information is no longer disclosed to the public. Alaska Stat. § 18.65.087(d)(4).

requirement is retributive. Those convicted of "aggravated" sex offenses must register four times each year for the rest of their lives, while those convicted of other sex offenses need only register annually for a period of 15 years. *See* Alaska Stat. § 12.63.020(a). However, it appears that the classification by the Alaska Sex Offender Registration Act of certain offenses as "aggravated" and others as not "aggravated" relates to the gravity of the wrongdoing, not the risk of recidivism posed by the wrongdoers. For example, the difference between first degree sexual abuse of a minor, which is an aggravated sexual offense, and second degree sexual abuse of a minor, which is not considered aggravated, is that the former prohibits someone over 16 from sexually penetrating a child under 13 while the latter prohibits someone over 16 from sexually penetrating a child between the ages of 13 and 15. *See* Alaska Stat. §§ 11.41.434; 11.41.436. This difference appears clearly to be related to the degree of wrongdoing, not the risk of recidivism.

In sum, the Act furthers the fundamental aims of punishment – retribution and deterrence. While the Act's requirements are not labeled as punishment, the nature and extent of their duration show that they serve not only as a deterrent but as retribution for the commission of sex offenses. Therefore, this *Mendoza-Martinez* factor strongly supports the conclusion that the Act's effect is punitive.

5. *Applies to criminal behavior*

That a statute applies only to behavior that is already criminal is an additional factor supporting the conclusion that its effect is punitive. *Mendoza-Martinez*, 372 U.S. at

168, 83 S.Ct. 554. As the state concedes, the Alaska statute applies only to those "convicted" of specified offenses. Alaska Stat. § 12.63.100(5).

In *Russell*, the fact that the statute applied to Washington sex offenders who were not found guilty of a crime as well as to those who were convicted was central to our conclusion that the Washington act was not punitive. 124 F.3d at 1091. Washington's statute specifically subjects sex offenders incompetent to stand trial and persons civilly committed as sexual psychopaths to its registration and notification requirements. *Id.* When considering Utah's sex offender registration and notification law, the Tenth Circuit concluded that the "criminal behavior" factor favored classification of the statute as non-punitive because it applied to those found not guilty on the ground of "mental incapacity." *Femedeer v. Haun*, 227 F.3d 1244, 1252 & n. 3 (10th Cir. 2000).

In contrast to Washington's and Utah's statute, Alaska's applies only to those found "guilty," including those found "guilty but mentally ill." Alaska Stat. § 12.63.100(3). It does *not* cover those found "not guilty by reason of insanity," or otherwise not convicted of a crime or those civilly committed.[9] *Id.* Unlike other states' sex offender registration laws, the Alaska statute's harsh requirements can be imposed only on individuals who

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[9] In Alaska, one who does not understand "the basic nature and quality of his or her conduct" is considered "not guilty by reason of insanity," while one who does not "appreciate the wrongfulness of his or her conduct" is considered "guilty but mentally ill." *Alaska v. Patterson*, 740 P.2d 944, 946-49 (Alaska 1987).

have suffered an actual criminal conviction in a court of law. Thus, this factor also provides support for the conclusion that the Act's effect is punitive.

6. *Non-punitive purpose*

The appellants concede, as they must, that there is a non-punitive purpose that can rationally be connected to the Act. That purpose, of course, is public safety, which is advanced by alerting the public to the risk of sex offenders in their communities. The existence of a non-punitive purpose for the Alaska statute, protecting public safety, unquestionably provides support, indeed the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes.

7. *Excessiveness*

The final, and, in this case, a highly significant, factor in the *Mendoza-Martinez* analysis is whether the Alaska Sex Offender Registration Act "appears excessive in relation to the alternative purpose assigned": public safety. *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. The appellants claim that the Act is excessive in relation to its public safety purpose because it is sweeping and overbroad in several respects. They emphasize that the scope of the statute is not limited to those who the state determines pose a future risk to the community: they point out specifically that, once convicted, it does not matter whether a defendant can prove that he has been rehabilitated and that he poses no threat of future criminal conduct. Under the statute, a judicial determination of rehabilitation (such as made in Doe I's case) is irrelevant,

and even law enforcement authorities are powerless to limit the widespread public distribution of the injurious, and possibly outdated, information that the statute provides for.

The statute at issue in *Russell* was far more limited than the Alaska statute in numerous respects. Most important to this part of our analysis, it only authorized release of "relevant and necessary information" concerning *certain* sex offenders. *Russell*, 124 F.3d at 1082. In Washington, information about sex offenders was disseminated only if the authorities determined, on an individual basis, that the offender posed a risk of recidivism. *Id.* (citing *Washington v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1070 (1994) (en banc) (in many cases, the legislature intended that a sex offender's information would not be released to the public)). Furthermore, in *Russell*, we found it significant that Washington's statute authorized dissemination of information about any particular sex offender only within a "narrow geographic area." *Russell*, 124 F.3d. at 1082. In contrast, in Alaska, information as to all sex offenders is made available world-wide on the internet without any restriction and without regard to whether the individual poses any future risk. Broadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to those to whom the particular offender may be of concern.[10]

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[10] We note also that it does not appear that the legislature, when enacting the Alaska Sex Offender Registration Act in response to concerns about child sexual abuse, made any attempt to determine which of the offenses it classified as "sex offenses" were likely to involve recidivism (against either adults or children) and thus which should be included in order to serve the statute's non-punitive purpose – public safety. Rates of recidivism vary considerably depending on the specific sex offense committed. *See* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and the Sex Offender Notification Laws*, 74 N.Y.U. L. Rev. 1451, 1458 (1999) (pedophiles, for example, have much higher rates of recidivism than other sex offenders).

With only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender.[11] *See Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (Tennessee statute); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir. 1997) (Connecticut statute); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) (New Jersey statute); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir. 1997) (New York statute). For example, with regard to the Connecticut statute, the Second Circuit concluded that it was not excessive because offenders who were convicted before the statute's enactment are subject to the statute's notification provisions only if, based on an "individualized

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[11] The only exception to this rule is found in an opinion that was filed after oral argument in this case, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). That case concerned the Utah sex offender registration and notification statute, which, like the Alaska statute, makes the state's entire sex offender registry accessible on the internet. *Id.* at 1247-48. Unlike the Alaska statute, however, the Utah database does not include employer names and addresses, and thus does not place the sex offenders' current employment in direct jeopardy. *See id.* at 1247 (reciting information contained in Utah database). In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*.

clinical assessment," they are found to pose a "high risk" of recidivism. *Roe*, 125 F.3d at 54. For offenders convicted after the statute's enactment, the court pointed out, disclosure is limited to specified members of the community, including the victim and his family, the police, the offender's immediate family, other occupants of the offender's residence, and treatment providers, unless the individual offender is determined to be "high risk." *Id.* at 50. Similarly, the Third Circuit upheld the New Jersey statute after finding that New Jersey classifies offenders by risk category, provides no public disclosure for those who pose the least risk (45 percent of offenders) and widespread disclosure only for those who pose the greatest risk (5 percent of offenders). *E.B.*, 119 F.3d at 1098.

In contrast, as we have noted, the Kansas Supreme Court considered a sex offender registration and notification statute that, like the Alaska statute, allowed unrestricted access to the registration information regardless of risk. *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). It concluded that the statute had a punitive effect, and therefore was an unconstitutional ex post facto law, because it was "excessive and beyond that necessary to promote public safety." *Id.* at 1043. Surveying other states' statutes, the Kansas Supreme Court concluded that almost every other state limited access by means such as: 1) basing the type of community notification on the specific risk level assigned to the individual offender (New Jersey, New York); 2) only releasing information to those living in close proximity to the offender (Louisiana); and 3) providing information only to those inquiring about a specific person (Iowa, North Carolina). *Id.* at 1029, 1038.

It based its holding that Kansas's broad notification provisions violated the Ex Post Facto Clause on its conclusion that "of the sex offender registration laws that have successfully overcome ex post facto challenges, none have [sic] provided for unlimited public access to the registered sex offender information." *Id.* at 1036.

Like the statute at issue in *Myers*, Alaska's statute is exceedingly broad. The unlimited breadth of the Alaska statute weighs strongly in favor of a determination that its effect is punitive. Indeed, the punitive effect caused by the excessiveness of the statute's provisions in relation to its non-punitive purpose is exemplified by John Doe I's case. Convicted of sexual abuse of his minor daughter, Doe I was successfully rehabilitated. After his release from prison, a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. On that basis, the court returned his minor daughter to his custody. Nevertheless, under the Alaska statute's registration provisions, Doe I would be forced to submit to in-person registration at his local police department four times a year, every year, and, under its notification provisions, he would be compelled forever to suffer the unremitting social obloquy and ostracism that would accompany his being publicly labeled a sex offender on Alaska's world-wide internet website. Presumably, in any state that does not provide for unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense, the record of John Doe I's past incest conviction would not be disseminated by state officials to the world at large for the rest of his life.

8. *Conclusion*

We conclude that the *effects* of the Alaska Sex Offender Registration Act are unquestionably punitive. The impact upon the lives of those affected by the Act's requirements is drastic indeed. The Act imposes more substantial burdens on those subject to its registration and notification requirements than does any legislation enacted by any other state, the provisions of which have been considered by a federal court of appeals.

In sum, the *Mendoza-Martinez* test leads us to hold that the effects of the specific provisions of the Alaska Act provide the "clearest proof" that, notwithstanding the legislature's non-punitive intent, the statute must be classified as punitive for Ex Post Facto Clause purposes. *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072. Four of the seven factors favor this result.[12] Two factors, particularly, demonstrate that the effect of this particular statute is to increase the penalty the law provided at the time Doe I and Doe II's offenses were committed. First, there is the substantial disability imposed by the Act. The registration provisions, which require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants, and annually for 15 years in the case of others, are extremely burdensome. This disability is exacerbated by the public notification provisions that plaintiffs' uncontradicted evidence demonstrates exposes

[12] We note that our conclusion is not based on a simple equation in which each factor is given equal weight. Rather, we consider the importance of each factor in relation to the legislative scheme we are examining.

all registrants to world-wide obloquy and ostracism. Second, unlike the sex offender registration and notification statutes upheld by the Second, Third and Sixth Circuits, as well as by this Circuit in *Russell*, the Alaska statute is excessive in relation to its non-punitive purpose. An offender cannot escape the Act's grasp no matter how clearly he may demonstrate that he poses no future risk to anyone, and no matter how final the judicial determination that he has been successfully rehabilitated; in short, under the Alaska statute, the requirements relating to disclosure of a past offense are not related to the risk posed. Furthermore, that the Act applies only to offenders who have been convicted of committing a crime and that it serves retributive and deterrent ends provides additional support for our conclusion that the Alaska statute is punitive.

Three factors suggest that the Act is not punitive. The first is the fact that sex offender registration and notification provisions have not historically been regarded as punishment. However, the fact that the Alaska statute is so much more sweeping in its scope than comparable statutes in other states leads us to limit the weight we place on this *Mendoza-Martinez* factor. The second is that it is not imposed only upon a finding of scienter. The relevance of this factor is to assist in the determination of whether the conduct giving rise to the sanction is the sort that traditionally subjects someone to punishment, because in general, *mens rea* is an element of a crime. In this case, however, given that conviction of a serious criminal offense is a prerequisite to the application of the statute, we do not believe that this factor provides much support for the conclusion that the Act is not punitive.

The final factor is the fact that the Act has a non-punitive purpose: protecting public safety. Here, we conclude that the non-punitive purpose, while of unquestioned importance, does not serve to render a statute that is so broad and sweeping non-punitive. Otherwise, we would not apply a two-part "intent-effects" test, the second part of which we reach *only* when the statute's purpose is non-punitive.

No one *Mendoza-Martinez* factor is determinative, and excessiveness, standing alone, would not be dispositive under the *Mendoza-Martinez* test. *Hudson v. United States*, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Still, we place substantial weight on the fact that the Act is far more swecping than necessary to serve the purpose of promoting public safety. This is so not only with respect to the undifferentiated scope of the Act but also with respect to the severity of the disabilities it imposes. Accordingly, we conclude that, weighing all of the *Mendoza-Martinez* factors together, the effects of the Act provide the clearest proof that it is punitive.[13]

Because the Alaska Sex Offender Registration Act increases the punishment for sex offenses, the Ex Post Facto Clause limits its application to those sex offenders

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[13] We recognize that applying a multi-factor test is frequently not an entirely satisfactory method of resolving legal issues. Sometimes, however, it is the best approach available to courts. In any event, the Supreme Court has applied this approach in analogous cases, *see, e.g., Hudson*, 522 U.S. at 99, 118 S.Ct. 488, and we have held that it is applicable to statutes such as the one before us. *Russell*, 124 F.3d at 1086-87.

whose crimes were committed after its enactment. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Doe I was convicted in 1985, and Doe II was convicted in 1984. The Alaska legislature enacted the Act in 1994. Therefore, the Alaska statute's application to the appellants violates the Ex Post Facto Clause.

III. APPELLANTS' OTHER CLAIMS

In addition to their Ex Post Facto Clause argument, plaintiffs claim that the statute violates their procedural and substantive Due Process Clause rights, as well as their federal constitutional privacy rights. Because we conclude that the Ex Post Facto Clause bars the application of the statute to Doe I or Doe II, we need not consider these arguments.[14] Our failure to address them should not be taken, however, as an indication that we do not believe that they have merit.[15]

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[14] In the complaint, Jane Doe I claims only that her privacy right, and not her Ex Post Facto Clause right, has been violated. Because we conclude that Jane Doe I's husband, John Doe I, is not subject to the Alaska statute, Jane Doe I will receive all of the relief that she seeks in her complaint, and therefore we need not decide whether the Act violates her privacy right.

[15] The state officials argue that our opinion in *Russell* forecloses the appellants' claims, because in that case we held that the Washington sex offender registration and notification statute does not implicate registrants' federal privacy rights. *See Russell*, 124 F.3d at 1093-94. However, in *Russell*, we made clear that the plaintiffs "fail to explain precisely how the Act violates [their privacy rights] beyond collating and releasing information." *Id.* at 1093. We then rejected their privacy argument after explaining that the mere "collection and

IV. CONCLUSION

We conclude that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause. We therefore REVERSE the district court's orders granting summary judgment for the state officials, and REMAND for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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dissemination of information" does not violate a privacy interest or amount to a deprivation of liberty. *Id.* at 1094. In this case, plaintiffs allege more that [sic] the mere collection and release of information – they assert that the state requires them to appear four times each year at local police stations to answer a host of questions, and labels them "sex offenders" on its internet website, which is accessible world-wide. Furthermore, in contrast to the Washington statute, Alaska's brands plaintiffs sex offenders without any attempt to classify them by risk posed, or to provide them with an opportunity to prove that they have been rehabilitated. While we do not decide whether the Alaska statute infringes on the appellants' due process rights, we doubt that *Russell* fairly could be read to stand for the exceedingly broad proposition urged by the state.

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Argued and Submitted: August 1, 2000
– Anchorage, Alaska
Opinion Filed: April 9, 2001]

Before: D.W. NELSON, REINHARDT and THOMAS, Circuit Judges

Opinion by Judge REINHARDT

REINHARDT, Circuit Judge:

This case involves an extremely sensitive and difficult question, both from a social and legal standpoint. How may society deal with convicted sex offenders *after* they have been punished for their crimes? How can society protect itself against future offenses and at the same time safeguard the constitutional rights of persons who have fully paid the price imposed by law for their crimes? The issues treated in the Alaska Sex Offender Registration Act we consider here differ only in degree from a host of other issues the citizens of this country regularly

face in trying to resolve the inherent tensions between safety and freedom that exist in any democracy.

As it turns out, we can decide the case before us without having to resolve the most fundamental question posed by the Alaska statute: that is, in light of the fundamental liberty interest protected by the Due Process Clause, may rehabilitation, or a judicial determination of lack of future risk, be wholly ignored when imposing restrictive requirements and obligations on persons who have committed a sexual offense and been fully punished for their crimes? Instead, we base our decision on a far narrower constitutional provision, the Ex Post Facto Clause.

The plaintiffs in this action are convicted sex offenders who have completed their sentences. They claim that Alaska's sex offender registration and notification statute, enacted after their convictions, both constitutes an ex post facto law and violates their Due Process rights. U.S. Const. Article I, § 10; Amend. 14. Because we conclude that, as to defendants whose crimes were committed before its enactment, the Alaska statute violates the Ex Post Facto Clause, we do not resolve the question whether it also violates the Due Process Clause.

The Ex Post Facto Clause serves two purposes: it requires fair notice, and, particularly relevant to the Alaska statute, it acts to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L.Ed. 162 (1810) (the Ex Post Facto Clause checks "the violent acts which might grow out of the feelings of the moment"). Convicted sex

offenders have good reason to fear vindictive legislation. Their crimes are viewed by society as an affront to the institution of the family. More important, many of us fear that upon their release, sex offenders will prey on our children and those of our neighbors.

The Ex Post Facto Clause expresses our commitment to constrain the manner in which legislatures can address intense fears of the type evoked by the return to the community of convicted sex offenders. However, its check on legislative power is quite limited – it merely requires that punishment be prospectively imposed. Because the Alaska Sex Offender Registration Act does not comply with this minimal protection, we hold that it may not be applied to persons whose crimes were committed before its enactment.

I. BACKGROUND

A. *Factual background*

On May 12, 1994, Alaska enacted the Alaska Sex Offender Registration Act (sometimes referred to in this opinion as "the Act" or "the Alaska statute"), which requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of information in the sex offender registry. 1994 Alaska Sess. Laws 41. In its implementing regulations, Alaska provides that it will, in all cases, post the information from the registry for public viewing in print or electronic form, so that it can be used by "any person" "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000). Upon passage of the Act, two men required to register, John Doe I and John Doe II, as well as John Doe I's wife,

immediately brought a 42 U.S.C. § 1983 action against the state commissioner for public safety and state attorney general to enjoin its enforcement.

In 1985, nine years before the Alaska statute was enacted, Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter for two years while she was between the ages of nine and eleven. He was sentenced to twelve years incarceration, of which four years were suspended; he was released from prison in 1990. After being released, Doe I was granted custody of his daughter, based on a court's determination that he had been successfully rehabilitated. In making its determination, the court relied, in part, on the findings of psychiatric evaluations concluding that Doe I has "a very low risk of re-offending" and is "not a pedophile." Also, since his release, Doe I married Jane Doe,who was aware of Doe I's conviction for a sex offense.

Jane Doe is a registered nurse in Anchorage, and is well known in the medical community there. She alleges that disclosure of her husband's criminal background will "undermine [her] professional relationships," and her ability to obtain and care for patients.

The third plaintiff, John Doe II, entered a plea of nolo contendere on April 8, 1984 to one count of sexual abuse of a minor for sexual abuse of a 14-year-old child. He was sentenced to eight years in prison, released in 1990, and subsequently completed a two-year program for the treatment of sex offenders.

B. *Prior Proceedings*

The plaintiffs filed a complaint in the district court claiming that the Alaska statute violates their federal and state constitutional rights and sought leave to proceed under pseudonyms. The district judge granted a preliminary injunction requiring the plaintiffs to register under the act but prohibiting public disclosure of the registration information; at the same time he denied their request to proceed under pseudonyms. *See Rowe v. Burton*, 884 F.Supp. 1372, 1388 (D.Alaska 1994).[1] The plaintiffs appealed the denial of their use of pseudonyms, and we dismissed the appeal because no final judgment had been entered. On remand, the district judge dismissed the complaint when the plaintiffs would not amend it to include their real names. The plaintiffs appealed the dismissal, and this court reversed, holding that the plaintiffs could proceed under pseudonyms.

With the nomenclature issue resolved, the parties in 1998 filed cross-motions for summary judgment. A different district judge granted the state's motion, and this appeal followed.[2]

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[1] When the complaint was filed, Doe I used the pseudonym "James Rowe." However, the court subsequently changed his pseudonym to "John Doe I" after an individual named James Rowe complained that he was suffering ill effects from Doe's use of the name in this matter.

[2] We offer no comment on the tortured course of the proceedings in this case or the fact that it is now seven years since the Alaska statute was enacted. We observe only that we now add to this judicial odyssey by deciding the case on the narrower of the two constitutional grounds, as that affords appellants all the relief they seek. The question whether the

C. *The Alaska Sex Offender Registration Act*

The Alaska Sex Offender Registration Act was enacted at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a "crisis." Legislators heard testimony that Alaska's rate of child sexual abuse was the highest in the country, that one-fourth of Alaska's prison inmates were incarcerated for sexual offenses, and that in 1993, one hundred sex offenders were scheduled for release from prison. On May 12, 1994, Alaska enacted its sex offender registration statute, and subsequently amended it in 1998 and 1999. 1998 Alaska Sess. Laws 81 & 106 (adding crimes to the list of "sex offenses" requiring registration); 1999 Alaska Sess. Laws 54 (defining "conviction").

The Alaska statute has two main components: it requires sex offender registration, with criminal penalties for failure to register, and it authorizes full disclosure of information about all offenders to the public. The registration provisions require persons convicted of a broad range of offenses against children and adults to register in person with local police authorities. Such offenses include, for example, sexual assault and possession of child pornography.[3]

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statute offends the rights of persons whose crimes were committed after its enactment will have to wait for another day.

[3] Other offenses include child kidnaping, felony sexual assaults, sexual abuse of a minor, incest, unlawful exploitation of a minor, promoting or forcing a minor to engage in prostitution, distribution of child pornography, felony indecent exposure, and misdemeanor indecent exposure where the victim is under 16 and the defendant has a prior conviction for certain offenses. Alaska Stat. § 12.63.100.

Alaska Stat. § 12.63.100(1)(B). Registrants must be photographed, provide fingerprints, and provide the following information: name, date of birth, address, place of employment, and information about the conviction (specifically the crime, date of conviction and place of conviction). Alaska Stat. § 12.63.010. Those convicted of "aggravated" sex offenses must register in person at their local police stations four times each year for life; those convicted of other sex offenses must register in person annually for fifteen years. Alaska Stat. § 12.63.020.

Information collected under the Alaska Sex Offender Registration Act is forwarded to the Alaska Department of Public Safety, which maintains a central registry. Alaska Stat. § 18.65.087. The parties agree that the Department of Public Safety has published the collected information on its internet website, making it readily available to all persons world-wide. The information on the website, which can be searched by name, partial address, zip code or city, includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner "Registered Sex Offender."

II. EX POST FACTO CLAIM

The Ex Post Facto Clause prohibits states from enacting any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 1 L.Ed. 648 (1798). There is no question that the Alaska statute, by its terms, applies to the plaintiffs even though

their crimes were committed before its enactment. However, the question when considering whether a retroactively applicable statute is subject to the constraints of the Ex Post Facto Clause is not whether it "produces some ambiguous sort of 'disadvantage,' . . . but . . . whether [it] . . . increases the penalty by which a crime is punishable." *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.

Whether a statute should be classified as imposing punishment involves a two-step inquiry. We must first consider whether, when enacting the Act, the Alaska legislature "indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). If we conclude that the legislature's intent was punitive, our inquiry is at an end. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). If we conclude that the legislature did not intend the statute to be considered punitive, or that its intent is ambiguous, then we must inquire whether the statute is "so punitive either in purpose or effect" that it should be considered to constitute punishment. *Ward*, 448 U.S. at 249, 100 S.Ct. 2636. This two-step inquiry is known as the "intent-effects test."[4] *Russell v. Gregoire*, 124 F.3d 1079, 1086 (9th Cir.1997).

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[4] The test is somewhat confusing, because the "effects" prong includes an exploration into both the effects of the statute and its actual purpose. The legislature's purpose is, of course, necessarily considered in the examination conducted under the first prong (the intent prong) of the test.

In other Ex Post Facto challenges to state sex offender registration and notification laws, some courts of appeals have analyzed separately the registration and notification provisions while others have looked to the statute as a whole. *Compare Russell*, 124 F.3d at 1087, 1089 (separately considering the registration and notification provisions); *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir.1997) (same) *with Cutshall v. Sundquist*, 193 F.3d 466, 473-76 (6th Cir.1999) (considering registration and notification provisions together). The Alaska legislature enacted the Alaska statute as a single piece of legislation, and the notification and registration provisions operate in tandem. Neither the structure of the statute nor the excerpts of the legislative debate included in the record indicate that the provisions were viewed as serving separate purposes. Nor does the state suggest on this appeal that the provisions should be treated separately for purposes of our constitutional analysis. Moreover, an Alaska intermediate appellate court recently considered the statute as a whole when deciding an Ex Post Facto challenge. *See Patterson v. Alaska*, 985 P.2d 1007, 1011-13 (Alaska Ct.App.1999). After reviewing the structure of the statute and its legislative history, we agree with the Alaska court that the proper approach is to analyze the statute as a whole.[5]

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[5] *Patterson* concluded that neither the intent nor the effects of the Alaska statute were punitive. *Patterson*, 985 P.2d at 1013. Determining "whether a particular [statute] is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248, 100 S.Ct. 2636. While we regard as "authoritative" the construction of a statute rendered by the state's highest court, *Russell*, 124 F.3d at 1090, we are *not* obligated to adopt that court's legal conclusion with regard to whether a legislature's purpose in enacting a statute is to punish. *Kansas v. Hendricks*, 521 U.S. 346,

A. *Intent of the Alaska Sex Offender Registration Act*

To determine the legislature's intent when enacting the Alaska Sex Offender Registration Act, we consider the body's declared purpose, the structure of the statute, and its design. *Russell*, 124 F.3d at 1087. Here, this examination produces conflicting signals as to whether the legislature intended the Act to be regarded as punitive.

One factor recently relied upon by the Supreme Court in determining whether a legislature intended a statute to be considered punitive is the statute's placement in the state code. When considering a civil commitment statute for sexual predators, the Court explained that the state's intent was not punitive on the basis of the fact that the provision was placed in the state's civil code, rather than in its criminal code. *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *see Femedeer v. Haun*, 227 F.3d 1244, 1249 (10th Cir.2000); *but see Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir.1999) ("location within criminal procedure laws does not necessarily indicate an intent on the part of the legislature to punish"); *Doe v. Pataki*, 120 F.3d 1263, 1277-78 (2d Cir.1997) (finding intent of statute non-punitive although

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365, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). In other words, we defer to a state highest court's determination concerning what the statute means, but we determine independently whether that meaning renders a statute punitive or not. Of course, we are not obliged to accept the *Patterson* court's construction of the Alaska statute because *Patterson* is not a decision of the Alaska Supreme Court. While we find some of its analysis persuasive, we ultimately reach the opposite conclusion as to whether, for Ex Post Facto purposes, the statute should be considered punitive.

it is placed in the state code's "Corrections Law" volume). The Alaska statute's placement provides conflicting signals as to whether the legislature intended it to be regarded as punitive.

The legislature codified the registration portion of the Act within Title 12 of the Alaska Code, which is entitled "Criminal Procedure," while codifying the notification provisions in Title 18, entitled "Health, Safety and Housing." If the statute were intended to be regarded as a non-punitive public safety measure, one would expect that it would have been placed entirely within the title of the Alaska code governing "Safety": Title 18. Title 18 includes chapters concerning sexual assault investigations (chapter 68); police protection (chapter 65); and even a registration provision (chapter 75, concerning licensing and control of dogs). Placement of the sex offender act's registration provisions in Title 12, suggests that the legislature was more concerned with the fact that the offenders are convicted criminals than with public safety administration.[6]

While the placement of the Act within the Alaska's code provides some evidence that it was, at least in part, intended to be punitive, two aspects of its design, in particular, provide much stronger evidence of punitive intent. The Act requires that when a defendant is sentenced for a sex offense, the registration and notification provisions are to be made a part of the criminal judgment against him. 1994 Alaska Sess. Laws 41, § 11. Alaska

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[6] However, the fact that the notification provisions are placed in Title 18 suggests that the legislature's intent may have been non-punitive.

criminal judgments must include the defendant's plea, the verdict or findings, and the adjudication and sentence. Alaska Rule of Crim. P. 32(b). In the case of someone convicted of a sexual offense, "the written judgment must [also] set out the requirements of [the Act]." Alaska Rule of Crim. P. § 32(c). Directing courts to include the registration and notification requirements of the Act in judgments evinces an intent that the application of its provisions to the defendant be regarded as part of his punishment for the crime, because the purpose of the judgment is to set forth the crime and punishment.[7]

Furthermore, the Act amends the state's rules of criminal procedure to compel judges to advise defendants about the Act's requirements before accepting guilty pleas. Alaska Rule of Crim. P. § 11(c). Making notice of the registration requirements a prerequisite for an informed guilty plea strongly suggests that the legislature

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[7] It could be argued that the legislature ordered courts to notify defendants of the Act's provisions when they are convicted simply as a means of providing notice to the defendants of its requirements. However, this argument ignores the fact that the "notice" is made part of the judgment, which is the legal statement of punishment. The Rule 32(b) requirements do not require judgments to contain any information except that relating to the crime and the punishment for the crime, even though notice of other facts usefully could be communicated at that time. For example, the rule does not require notice of the right to appeal as part of the judgment. Such notice must be given by the judge at the time of sentencing, but it is not part of the official judgment against the defendant. Alaska Rule of Crim. P. § 32.5. While the defendant only has thirty days to file an appeal, if he is incarcerated at the time of conviction, he need not register as a sex offender until 30 days before he is released from prison. Rule 32.5; Alaska Stat. § 12.63.010(a)(1) (1999).

acknowledges that the requirements constitute punishment.

While the structure and design of the statute indicate that it is intended to be regarded as punitive, the Act's legislative findings indicate otherwise. Section 1 of the Alaska statute states:

> "The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety."

1994 Alaska Sess. Laws 41, § 1.

These findings indicate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose – protection of the public through the collection and release of information. *Patterson*, 985 P.2d at 1011 (findings make clear that legislature viewed "recidivism of sex offenders [as] a problem," and sought to address the problem through "the release of certain information").

We recently considered whether Washington's sex offender registration statute violated the Ex Post Facto Clause. *See Russell v. Gregoire*, 124 F.3d 1079 (9th Cir.1997). In *Russell*, we determined that Washington's far more

narrowly drawn and limited statute did not violate that Clause because it could not be considered punitive. *Id.* at 1089, 1093. We looked to legislative findings that included a statement that it is Washington's policy to better enable law enforcement "to protect their communities by regulating sex offenders," and found that statement conclusive of the fact that the intent of the law was regulatory, not punitive. 124 F.3d at 1087. In the present case, however, while the legislative findings provide some support for the proposition that the Act is not intended to be punitive, the findings are by no means conclusive. Here, as we have explained above, unlike the Washington statute, the structure and design of the Alaska Act support the contrary conclusion: that the legislature intended that the statute be punitive.

Having carefully considered both the legislative findings and the statute's structure and design, we conclude that the Alaska legislature has not clearly expressed its intent as to whether or not the Act should be considered punitive. Thus, we now turn to the "effects" prong.

B. *The Alaska Statute's Punitive Effect*

When a legislature plainly states its intent that a statute is *not* punitive, courts must "reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention." *Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072 (internal quotations omitted); *Russell*, 124 F.3d at 1087. In this case, however, because we have

concluded that the legislative intent is unclear, the "clearest proof" test does not apply and, in examining the statute's effects, we apply ordinary and customary legal standards. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Mendoza-Martinez instructs us to consider seven factors when applying the effects prong of the two-step test. *Id.* ("[a]bsent conclusive evidence of congressional intent as to the penal nature or a statute, [the seven factors listed below] must be considered in relation to the statute on its face").

1) whether the sanction involves an affirmative disability or restraint;

2) whether it has historically been regarded as a punishment;

3) whether it comes into play only on a finding of scienter;

4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5) whether the behavior to which it applies is already a crime;

6) whether an alternative purpose to which it may rationally be connected is assignable to it; and

7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69, 83 S.Ct. 554.

We applied these factors in *Russell* in order to determine whether Washington's narrowly drawn and strictly limited sex offender registration statute violated the Ex Post Facto Clause, and we held that it did not. *Russell*, 124 F.3d at 1089, 1093. Here, the application of the seven factors leads us to the conclusion that Alaska's statute, which is far broader and far more punitive in nature than Washington's, *is* designed to punish sex offenders, and thus does offend the Ex Post Facto Clause.[8]

1. *Affirmative disability or restraint*

The Alaska Sex Offender Registration Act imposes an affirmative disability on the plaintiffs. First, its registration provisions impose a significant affirmative disability by subjecting offenders to onerous conditions that in some respects are similar to probation or supervised release. Like Washington's sex offender registration statute, Alaska's requires offenders being released from confinement to register. Alaska Code § 12.63.010(a); *Russell*, 124 F.3d at 1082. However, unlike the Washington statute, Alaska's requires sex offenders such as the plaintiffs to re-register at police stations four times each year every year of their lives. Alaska Code § 12.63.010(d). Moreover, in order to do so, they must appear in person at a police station on each occasion, and provide, under oath, a wide

[8] As we noted, *supra*, in *Russell* we required a showing of the "clearest proof" because we determined that the legislature's manifest intent was that the statute not be deemed punitive, while here, because the legislative intent is unclear, we do not apply so burdensome a standard.

variety of personal information, including address, anticipated change of address, employer address, vehicle description, and information concerning mental health treatment for any "mental abnormality or personality disorder." § 12.63.010(b).

In *Russell*, we concluded that Washington's registration provisions did not impose an affirmative disability or restraint. *Russell*, 124 F.3d at 1088-89. However, as the state acknowledges, Alaska's registration requirement is vastly more burdensome than the one-time registration requirement at issue in *Russell*. We held in *Russell* that Washington's "simple registration" provision, involving a one-time only registration (except when changing one's address), does not work an affirmative disability or restraint. *Russell*, 124 F.3d at 1082, 1088. In part because Alaska's registration provision is far more onerous, we reach a different conclusion here.

Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

In reviewing a sex offender law that authorized public inspection of sex offender records at police departments and permitted newspapers or others to

disseminate the information, the Kansas Supreme Court concluded that the law imposed a disability because "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). Where the impact is substantially less severe, however, the disability is not such as to warrant a finding that the statute is punitive. Such was the conclusion in *Cutshall*, 193 F.3d at 471, where a Tennessee statute limited disclosure of information to the amount "deemed necessary . . . to protect the public concerning a specific sexual offender," and in *Pataki*, 120 F.3d at 1269-70, where a New York act permitted such disclosure only on the basis of an individualized assessment of the risk of recidivism. Alaska's system of posting all sex offenders' information on the internet is far closer to the statutory scheme in *Myers* and, in fact, is likely to have a far greater impact on offenders. Because the internet is much more accessible to the public than records at police departments, the obloquy and scorn noted in *Myers* are more certain to result.

A statute also may be considered non-punitive where the specific disability is narrow. In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Supreme Court held that a sanction of "occupational debarment" from the banking industry for those found to have misappropriated bank funds is not an "affirmative disability or restraint" because the disability is severely limited. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. In contrast, in the present case, the procedures employed under the Alaska statute are likely to make the plaintiffs *completely* unemployable. Alaska publishes the names and addresses

of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment. By doing so, it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders. This disability is far more substantial than the one at issue in *Hudson*, which merely involved debarment from a single profession. Indeed, the breadth of the impact of the Alaska statute provides strong evidence that the statute's effect is punitive. *See Myers*, 923 P.2d at 1041 (sex offender statute that permits public disclosure of offender's employment information imposes an affirmative disability).

The state argues that *Russell* compels the conclusion that the Alaska statute's notification provisions do not impose an affirmative disability. As noted earlier, however, *Russell* involved a statute with a far more limited notification provision. The Washington statute we considered in *Russell* authorizes release of information only when it has been determined that the specific offender poses a risk of reoffending, and even then, the information disclosed is much more limited than the information Alaska discloses. *Russell*, 124 F.3d at 1082. Furthermore, under the Washington act, disclosure is limited to a narrow geographic area within the state of Washington, whereas here the notification of a defendant's lurid past is world-wide. *Id.* Moreover, when considering whether Washington's limited notification provisions posed an

affirmative disability, we "actively weigh [ed]" the harsh results of the community notification provisions, including "humiliation, ostracism, public opprobrium, and the loss of job opportunities," but decided that the disability was not "so egregious" as to prevent the court from concluding that the statute was regulatory. *Russell*, 124 F.3d at 1092.

In *Russell*, therefore, we *did* determine that the notification provisions imposed an affirmative disability. We made this clear by "actively weighing" the statute's consequences along with the other *Mendoza-Martinez* factors. We ultimately concluded, however, that the disability was insufficient to overcome the clear legislative intent that the statute not be punitive, particularly in light of some of the other relevant *Mendoza-Martinez* factors and the applicability of the "clearest proof" standard.

Considered as a whole, the Alaska statute's registration and notification provisions, impose a significant disability on the plaintiffs. Both the registration and notification provisions are far more burdensome than the provisions we considered in *Russell*. Moreover, the standard of proof we apply here is different than in our earlier case. When the applicable provisions of the Alaska statute are considered together, the first *Mendoza-Martinez* factor clearly favors treating the Act as punitive.

2. *Historical treatment*

Sex offender registration and notification statutes are of fairly recent origin.[9] Other courts considering such statutes consider whether they are analogous to historical shaming punishments. In *Russell*, we concluded that the provisions of the Washington statute were not. *Russell*, 124 F.3d at 1092. We reach the same conclusion here. Accordingly, the second factor favors treating the statute as non-punitive.

3. *Finding of scienter*

The third *Mendoza-Martinez* factor is whether the statute's provisions come into effect only upon a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. A defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter. However, some of the offenses that subject an offender to the Act's requirements are "strict liability" offenses that can be committed whether or not the defendant is aware of certain facts that make his conduct criminal. For example, conviction for sexual abuse of a minor under 13 years of age does not require any showing that the defendant

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[9] The first sex offender community notification statute was enacted by Washington in 1990. Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am.Crim. L.Rev. 333, 334-35 (1998). After the 1994 killing of Megan Kanka in New Jersey, such statutes became widespread. *Id.*

knows that his victim is under that age. Alaska Stat. §§ 11.41.434; 11.41.445(b).

Our inquiry when considering this factor is whether the Act's requirements may be imposed *only* upon a finding a scienter. *Hudson*, 522 U.S. at 104, 118 S.Ct. 488. While the Alaska statute generally requires a finding of scienter, its provisions do not become applicable *only* in such circumstance. Accordingly, like the second *Mendoza-Martinez* factor, this factor supports the conclusion that the Act is not punitive.

4. *Traditional aims of punishment*

When a statute promotes the traditional aims of punishment – retribution and deterrence, its effect is more likely to be considered punitive. *Id.* This court has previously held that Washington's statute, which is substantially less onerous than Alaska's, "may implicate deterrence," *Russell*, 124 F.3d at 1091, and the *Patterson* court reached the same conclusion with regard to the Alaska statute. *Patterson*, 985 P.2d at 1012. Accordingly, we conclude that the Act may provide a measure of deterrence; the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders.

While the Alaska statute may have some deterrent effect, it even more directly serves the other traditional aim of punishment – retribution. It is primarily this objective that causes us to weigh the fourth factor on the side of finding the Act punitive. When the *Russell* court determined that the Washington statute was not retributive, it

relied in part on the fact that the effect of the statute was not to "labe[l] the offender as more culpable than before." 124 F.3d at 1091. The Alaska statute, in contrast, mandates inclusion of the registration requirements in judgments of conviction, which are the formal documents in which the state describes the defendant's culpability. Alaska Rule of Crim. P. § 32(c). As part of their sentences, sex offenders are notified that, included with the punishment is the obligation to comply with the provisions of the Alaska Sex Offender Registration Act.

Furthermore, the Act's registration obligations imposed on sex offenders appear to be inherently retributive. The duty of sex offenders to report quarterly to their local police stations may be analogized to the duty imposed in a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release. Such obligations are part of the punishment meted out through a defendant's criminal sentence. *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir.1995).

Moreover, the duration of the Act's requirements provides additional support for the conclusion that retribution is an objective of the Act. For offenses that are not classified as aggravated, the Act requires registration for 15 years.[10] Alaska Stat. § 12.63.020(a). However, for each year that an offender fails to comply with the registration

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[10] When an offender is no longer required to register, the state removes his name from the registry, and therefore his information is no longer disclosed to the public. Alaska Stat. § 18.65.087(d)(4).

requirements, the 15 year period is extended by an additional year. Alaska Stat. § 12.63.020(a)(2). The relationship between failing to renew the registration annually and the statute's non-punitive public safety objective – preventing recidivism – seems tenuous. On the other hand, if registration is punitive, requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years) achieves a statutory purpose, because the penalty for the sex offense includes the requirement of annual in-person registration 15 separate times.

Finally, that the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed, indicates that the requirement is retributive. Those convicted of "aggravated" sex offenses must register four times each year for the rest of their lives, while those convicted of other sex offenses need only register annually for a period of 15 years. *See* Alaska Stat. § 12.63.020(a). However, it appears that the classification by the Alaska Sex Offender Registration Act of certain offenses as "aggravated" and others as not "aggravated" relates to the gravity of the wrongdoing, not the risk of recidivism posed by the wrongdoers. For example, the difference between first degree sexual abuse of a minor, which is an aggravated sexual offense, and second degree sexual abuse of a minor, which is not considered aggravated, is that the former prohibits someone over 16 from sexually penetrating a child under 13 while the latter prohibits someone over 16 from sexually penetrating a child between the ages of 13

and 15. *See* Alaska Stat. §§ 11.41.434; 11.41.436. This difference appears clearly to be related to the degree of wrongdoing, not the risk of recidivism.

In sum, the Act appears to further the fundamental aims of punishment – retribution and deterrence. While the Act's requirements are not labeled as punishment, their inclusion in the criminal judgment and the nature and extent of their duration suggest that they serve as retribution for the commission of sex offenses. Furthermore, this court has previously recognized that sex offender registration and notification laws may deter those inclined to commit (at least some) sex offenses. *See Russell*, 124 F.3d at 1091. Therefore, this *Mendoza-Martinez* factor supports the conclusion that the Act's effect is punitive.

5. *Applies to criminal behavior*

That a statute applies only to behavior that is already criminal is an additional factor supporting the conclusion that its effect is punitive. *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. As the state concedes, the Alaska statute applies only to those "convicted" of specified offenses. Alaska Stat. § 12.63.100(5).

In *Russell*, the fact that the statute applied to Washington sex offenders who were not found guilty of a crime as well as to those who were convicted was central to our conclusion that the Act was not punitive. 124 F.3d at 1091. Washington's statute specifically subjects sex offenders incompetent to stand trial and persons civilly committed as sexual psychopaths to its registration and

notification requirements. *Id.* When considering Utah's sex offender registration and notification law, the Tenth Circuit concluded that the "criminal behavior" factor favored classification of the statute as non-punitive because it applied to those found not guilty on the ground of "mental incapacity." *Femedeer*, 227 F.3d at 1252 & n. 3.

In contrast to Washington's and Utah's statute, Alaska's applies only to those found "guilty," including those found "guilty but mentally ill." Alaska Stat. § 12.63.100(3). It does *not* cover those found "not guilty by reason of insanity," or otherwise not convicted of a crime or those civilly committed.[11] *Id.* Unlike other states' sex offender registration laws, the Alaska statute's harsh requirements can be imposed only on individuals who have suffered an actual criminal conviction in a court of law. Thus, this factor also provides support for the conclusion that the Act's effect is punitive.

6. *Non-punitive purpose*

The appellants concede, as they must, that there is an alternative non-punitive purpose, as well as a punitive one, that can rationally be connected to the Act. That purpose, of course, is public safety, which is advanced by

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[11] In Alaska, one who does not understand "the basic nature and quality of his or her conduct" is considered "not guilty by reason of insanity," while one who does not "appreciate the wrongfulness of his or her conduct" is considered "guilty but mentally ill." *Alaska v. Patterson*, 740 P.2d 944, 946-49 (Alaska 1987).

alerting the public to the risk of sex offenders in their communities. The existence of a non-punitive alternative purpose for the Alaska statute, protecting public safety, unquestionably provides support, indeed the principal support, for the view that the statute is not punitive for Ex Post Facto Clause purposes.[12]

7. *Excessiveness*

The final, and, in this case, a highly significant, factor in the *Mendoza-Martinez* analysis is whether the Alaska Sex Offender Registration Act "appears excessive in relation to the alternative purpose assigned": public safety. *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. The appellants claim that the Act is excessive in relation to its public safety purpose because it is sweeping and excessive in several respects. They emphasize that the scope of

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[12] *Russell* states in dictum that even if the non-punitive purpose were merely ancillary to the overriding punitive purpose of the statute, we may still conclude that the statute is not punitive, presumably on the basis of a clear legislative intent and an assessment of the other *Mendoza-Martinez* factors. *See Russell*, 124 F.3d at 1086. We need not examine that dictum here, because in the present case, the legislative intent is unclear and the other factors, taken as a whole, support the conclusion that the Act is punitive. We note, moreover, that under *Mendoza-Martinez*, the finding that an alternative non-punitive purpose exists, ancillary or not, clearly does not end the inquiry. Rather, in such cases, the court must proceed to determine, inter alia, whether the alternative purpose "appears excessive in relation to the alternative purpose." *Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. 554. We undertake that step in the analysis in the subsection of the text that immediately follows.

the statute is not limited to those who the state determines pose a future risk to the community: they point out specifically that, once convicted, it does not matter whether a defendant can prove that he has been rehabilitated and that he poses no threat of future criminal conduct. Under the statute, a judicial determination of rehabilitation (such as made in Doe I's case) is irrelevant, and even law enforcement authorities are powerless to limit the widespread public distribution of the injurious, and possibly outdated, information that the statute provides for.

The statute at issue in *Russell* was much more limited than the Alaska statute in numerous respects. Most important to this part of our analysis, it only authorized release of "relevant and necessary information" concerning *certain* sex offenders. *Russell*, 124 F.3d at 1082. In Washington, information about sex offenders was disseminated only if the authorities determined, on an individual basis, that the offender posed a risk of recidivism. *Id.* (citing *Washington v. Ward*, 123 Wash.2d 488, 869 P.2d 1062, 1070 (1994) (en banc) (in many cases, the legislature intended that a sex offender's information would not be released to the public)). Furthermore, in *Russell*, we found it significant that Washington's statute authorized dissemination of information about any particular sex offender only within a "narrow geographic area." *Russell*, 124 F.3d. at 1082. In contrast, in Alaska, information as to all sex offenders is made available world-wide on the internet without any restriction and without regard to whether the individual poses any future risk. Broadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to

those to whom the particular offender may be of concern.[13]

With only one exception, every sex offender registration and notification law that has been upheld by a federal Court of Appeals has tailored the provisions of the statute to the risk posed by the offender.[14] *See Cutshall v. Sundquist*, 193 F.3d 466, 474 (6th Cir.1999) (Tennessee statute); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir.1997) (Connecticut statute); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir.1997) (New Jersey statute); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir.1997) (New York statute). For example, with regard to the Connecticut

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[13] We note also that it does not appear that the legislature, when enacting the Alaska Sex Offender Registration Act in response to concerns about child sexual abuse, made any attempt to determine which of the offenses it classified as "sex offenses" were likely to involve recidivism (against either adults or children) and thus which should be included in order to serve the statute's non-punitive purpose – public safety. Rates of recidivism vary considerably depending on the specific sex offense committed. *See* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and the Sex Offender Notification Laws*, 74 N.Y.U. L.Rev. 1451, 1458 (1999) (pedophiles, for example, have much higher rates of recidivism than other sex offenders).

[14] The only exception to this rule is found in an opinion that was filed after oral argument in this case, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir.2000). That case concerned the Utah sex offender registration and notification statute, which makes the state's entire sex offender registry accessible on the internet. *See id.* at 1247-48. In that case, unlike here, the Tenth Circuit examined whether the "clearest proof" demonstrated that the effects of the statute were punitive, because the Utah legislature's manifest intent was that the statute be regarded as non-punitive. *Id.* at 1249.

statute, the Second Circuit concluded that it was not excessive because offenders who were convicted before the statute's enactment are subject to the statute's notification provisions only if, based on an "individualized clinical assessment," they are found to pose a "high risk" of recidivism. *Roe*, 125 F.3d at 54. For offenders convicted after the statute's enactment, the court pointed out, disclosure is limited to specified members of the community, including the victim and his family, the police, the offender's immediate family, other occupants of the offender's residence, and treatment providers, unless the individual offender is determined to be "high risk." *Id.* at 50. Similarly, the Third Circuit upheld the New Jersey statute after finding that New Jersey classifies offenders by risk category, provides no public disclosure for those who pose the least risk (45 percent of offenders) and widespread disclosure only for those who pose the greatest risk (5 percent of offenders). *E.B.*, 119 F.3d at 1098.

In contrast, as we have noted, the Kansas Supreme Court considered a sex offender registration and notification statute that, like the Alaska statute, allowed unrestricted access to the registration information regardless of risk. *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996). It concluded that the statute had a punitive effect, and therefore was an unconstitutional ex post facto law, because it was "excessive and beyond that necessary to promote public safety." *Id.* at 1043. Surveying other states' statutes, the Kansas Supreme Court concluded that almost every other state limited access by means such as: 1) basing the type of community notification on the specific risk level assigned to the individual offender (New Jersey, New York); 2) only releasing information to those

living in close proximity to the offender (Louisiana); and 3) providing information only to those inquiring about a specific person (Iowa, North Carolina). *Id.* at 1029, 1038. It based its holding that Kansas's broad notification provisions violated the Ex Post Facto Clause on its conclusion that "of the sex offender registration laws that have successfully overcome ex post facto challenges, none have (sic) provided for unlimited public access to the registered sex offender information." *Id.* at 1036.

Like the statute at issue in *Myers*, Alaska's statute is exceedingly broad. The unlimited breadth of the Alaska statute weighs strongly in favor of a determination that its effect is punitive. Indeed, the punitive effect caused by the excessiveness of the statute's provisions in relation to its non-punitive purpose is exemplified by John Doe I's case. Convicted of sexual abuse of his minor daughter, Doe I was successfully rehabilitated. After his release from prison, a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. On that basis, the court returned his minor daughter to his custody. Nevertheless, under the Alaska statute's registration provisions, Doe I would be forced to submit to in-person registration at his local police department four times a year, every year, and, under its notification provisions, he would be compelled forever to suffer the unremitting social obloquy and ostracism that would accompany his being publicly labeled a sex offender on Alaska's world-wide internet website. Presumably, in any state that does not provide for unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense, the record of John Doe I's past incest conviction would not be

disseminated by state officials to the world at large for the rest of his life.

8. *Summary*

In sum, the *Mendoza-Martinez* test leads us to hold that the Act's effect is sufficiently punitive that notwithstanding the legislature's ambiguous intent, the Alaska statute should be classified as punitive for Ex Post Facto Clause purposes. Four of the seven actors favor this result.[15] Two factors, particularly, demonstrate that the effect of this particular statute is to increase the penalty the law provided at the time Doe I and Doe II's offenses were committed. First, there is the substantial disability imposed by the Act. The registration provisions, which require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants, and annually for 15 years in the case of others, are extremely burdensome. This disability is exacerbated by the public notification provisions that plaintiffs' uncontradicted evidence demonstrates exposes all registrants to world-wide obloquy and ostracism. Second, unlike the sex offender registration and notification statutes upheld by the Second, Third and Sixth Circuits, as well as by this Circuit in *Russell*, the Alaska statute is excessive in relation to its non-criminal purpose. An offender cannot

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[15] We note that our conclusion is not based on a simple equation in which each factor is given equal weight. Rather, we consider the importance of each factor in relation to the legislative scheme we are examining.

escape the Act's grasp no matter how demonstrable it may be that he poses no future risk to anyone, and no matter how final the judicial determination that he has been successfully rehabilitated; in short, under the Alaska statute, the requirements relating to disclosure of a past offense are not related to the risk posed. Furthermore, that the Act applies only to offenders who have been convicted of committing a crime, that its requirements are incorporated in the criminal judgment imposed, and that it otherwise serves retributive ends, provides additional support for our conclusion that the Alaska statute is punitive.

Three factors suggest that the Act is not punitive. The first is the fact that sex offender registration and notification provisions have not historically been regarded as punishment. However, the fact that the Alaska statute is so much more sweeping in its scope than comparable statutes in other states leads us to limit the weight we place on this *Mendoza-Martinez* factor. The second is that it is not imposed only upon a finding of scienter. The relevance of this factor is to assist in the determination of whether the conduct giving rise to the sanction is the sort that traditionally subjects someone to punishment, because in general, *mens rea* is an element of a crime. In this case, however, given that the conduct that does not require a finding of scienter, conviction of offenses such as sexual abuse of a child under 13 years of age, is serious criminal activity, we do not believe that this factor lends much support for the conclusion that the Act is not punitive. The final factor is the fact that the Act has a non-punitive purpose: protecting public safety. Here, we

conclude that the additional purpose, while of unquestioned importance, does not serve to render a statute that is so broad and sweeping non-punitive.

No one *Mendoza-Martinez* factor is determinative, and excessiveness, standing alone, would not be dispositive under the *Mendoza-Martinez* test. *Hudson v. United States*, 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Still, we place substantial weight on the fact that the Act is far more sweeping than necessary to serve its alternate purpose, promoting public safety. This is so not only with respect to the undifferentiated scope of the Act but also with respect to the severity of the disabilities it imposes. When we weigh all the *Mendoza-Martinez* factors together, we conclude, on balance, that for purposes of the Ex Post Facto Clause, the effect of the Alaska statute is punitive.[16]

Because the Alaska Sex Offender Registration Act increases the punishment for sex offenses, the Ex Post Facto Clause limits its application to those sex offenders whose crimes were committed after its enactment. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Doe I was convicted in 1985, and Doe II was convicted in 1984. The Alaska legislature enacted the Act in 1994. Therefore, the Alaska statute's application to the appellants violates the Ex Post Facto Clause.

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[16] We recognize that applying a multi-factor test is frequently not an entirely satisfactory method of resolving legal issues. Sometimes, however, it is the best approach available to courts. In any event, it is the approach that the Supreme Court has held should be applied here. *See Russell*, 124 F.3d at 1086-87.

III. APPELLANTS' OTHER CLAIMS

In addition to their Ex Post Facto Clause argument, plaintiffs claim that the statute violates their procedural and substantive Due Process Clause rights, as well as their federal constitutional privacy rights. Because we conclude that the Ex Post Facto Clause bars the application of the statute to Doe I or Doe II, we need not consider these arguments.[17] Our failure to address them should not be taken, however, as an indication that we do not believe that they have merit.[18]

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[17] In the complaint, Jane Doe I claims only that her privacy right, and not her Ex Post Facto Clause right, has been violated. Because we conclude that Jane Doe I's husband, John Doe I, is not subject to the Alaska statute, Jane Doe I will receive all of the relief that she seeks in her complaint, and therefore we need not decide whether the Act violates her privacy right.

[18] The state officials argue that our opinion in *Russell* forecloses the appellants' claims, because in that case we held that the Washington sex offender registration and notification statute does not implicate registrants' federal privacy rights. *See Russell*, 124 F.3d at 1093-94. However, in *Russell*, we made clear that the plaintiffs "fail to explain precisely how the Act violates [their privacy rights] beyond collating and releasing information." *Id.* at 1093. We then rejected their privacy argument after explaining that the mere "collection and dissemination of information" does not violate a privacy interest or amount to a deprivation of liberty. *Id.* at 1094. In this case, plaintiffs allege more that [sic] the mere collection and release of information – they assert that the state requires them to appear four times each year at local police stations to answer a host of questions, and labels them "sex offenders" on its internet website, which is accessible world-wide. Furthermore, in contrast to the Washington statute, Alaska's brands plaintiffs sex offenders without any attempt to classify them by risk posed, or to provide them with an opportunity to prove that

IV. CONCLUSION

We conclude that the Alaska Sex Offender Registration Act violates the Ex Post Facto Clause. We therefore REVERSE the district court's orders granting summary judgment for the state officials, and REMAND for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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they have been rehabilitated. While we do not decide whether the Alaska statute infringes on the appellants' due process rights, we doubt that *Russell* fairly could be read to stand for the exceedingly broad proposition urged by the state.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN DOE I, et al., Plaintiffs, vs. RONALD L. OTTE, Commissioner, et al., Defendants.	)	No. A94-0206-CV (HRH)

ORDER

(Filed Mar. 31, 1999)

Cross-Motions for Summary Judgment

Defendants move for partial summary judgment.[1] This motion is opposed. Plaintiffs' cross-move for summary judgment.[2] This motion is also opposed. Oral argument has not been requested.

FACTS

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010 to -.100 (1994) and AS 18.65.087

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[1] Clerk's Docket No. 95.

[2] Clerk's Docket No. 107.

(1994),[3] on both federal and state constitutional grounds. Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the state of Alaska and Bruce M. Botelho, Attorney General for the state of Alaska. They are named in both their official and individual capacities.

Prior to the enactment of ASORA in 1993, hearings were held before the Alaska Legislature. Testimony before the legislature showed that there is a high level of sexual abuse in Alaska, a large and growing number of sexual offenders in Alaska, and a high level of recidivism in sex offenders.

With respect to the high level of sexual abuse in Alaska, the testimony showed that Alaska had the highest child sexual abuse rate in the nation; the rate was said to be approximately six times the national average.[4] Moreover, the sexual assault rate was reported to be the

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[3] In 1998 and 1999, changes were made by the Alaska Legislature to the registration and notification provisions of ASORA. The plaintiffs moved for leave to file a supplemental brief addressing the changes made. Clerk's Docket No. 115. The court's analysis of ASORA on the parties' cross-motions for summary judgment addresses the substance of ASORA which was not affected by the recent changes. The motion for leave to file supplemental brief is denied.

[4] Hearing on HB 69 before the House State Affairs Committee, 18th Alaska Legislature, 1st Session (Feb. 2, 1993). Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993).

second highest in the nation.[5] Finally, the incidence of rape had increased 91% in the previous two years.[6]

Testimony also indicated that there are a large number of sexual offenders in Alaska. In 1993, for instance, approximately one-fourth of Alaska's prison inmates were incarcerated for sexual offenses.[7] In 1993, 100 sex offenders were scheduled to be released, whereas prior to 1993, only 50 sex offenders were released annually.[8] Finally, studies presented to the legislature evidenced an extremely high recidivism rate for sex offenders.[9]

The Alaska Legislature made the following legislative findings:

> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;

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[5] *Id.*

[6] Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993) (testimony of Cindy Smith, Executive Director, Network on Domestic Violence and Sexual Assault.

[7] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Mar. 3, 1993) (testimony of C.E. Swackhammer, Deputy Commissioner, Dept. of Public Safety).

[8] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993) (testimony of Cindy Smith).

[9] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993).

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

§ 1, Ch. 41, SLA 1994.

Based upon this legislative fact-finding, the Alaska Legislature enacted ASORA which included both registration and notification provisions for sex offenders. "Sex offender" is defined as a person convicted of a sex offense[10] in any jurisdiction, regardless of whether the conviction occurred before, after, or on August 10, 1994 (the effective date of ASORA). To fulfill the registration requirements, a sex offender must register in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender resides at the time of registration and (1) complete a registration form which includes, at a minimum, the sex offender's name, address, place of employment, date of birth, each conviction for a sex offense for which there is a duty to register, all aliases used, and driver's license number; (2) be fingerprinted, and (3) be photographed. AS 12.63.010(b)(1)-(2) (1994).

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[10] Sex offense is defined in AS 12.63.100(3) (1994) as a crime, or an attempt to commit a crime, under AS 11.41.410 to 11.41.438, AS 11.41.450, AS 11.41.455, AS 11.61.125, AS 11.66.110, former AS 11.15.120 or AS 11.15.134, or former AS 11.40.110 or AS 11.40.200, or a similar law in another jurisdiction.

The registration requirements end 15 years after an offender's unconditional discharge if the offender has only one prior sex offense, but continue for the offender's lifetime if the offender has been convicted of two or more sex offenses. AS 12.63.020(a) (1994).

The notification provisions provide that the public can have access to the offender's name, date of birth, address, photograph, place of employment, and public information about the conviction (date, place, court of conviction, and length of sentence). AS 18.65.087(b) (1994) The Department of Public Safety is charged with maintaining a central registry of sex offenders. AS 18.65.087(a) (1994).

Up until June of 1997, anyone could purchase a complete list of the state's registered sex offenders or have a specific search conducted for $10.[11] In addition, a person could look at the list for free at Alaska state trooper offices. "In an ongoing effort to make Alaska communities safer and give the public easy access to information about people convicted or rape of child molestation," the Department of Public Safety made the Alaska Sex Offender Registry database available worldwide via the Internet at http://www.dps.state.ak.us/sorcr/ in June of 1997.[12] At the same time, the state waived any charges or fees for requests of paper copies of the list of sex offenders to make the "information available to as many

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[11] Clerk's Docket No. 107, Exhibit 4.

[12] Clerk's Docket No. 197, Exhibit 5 at 1.

citizens as possible."[13] The opening display of the registered sex offender Internet site contains the following warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution."[14]

The plaintiffs first brought this suit in 1994. They moved for a preliminary injunction seeking to enjoin the enforcement of ASORA. The motion was denied in part and granted in part. The court found that John Doe I and Doe II were required to register under ASORA; however, it enjoined the state from releasing their registration information as part of the notification procedures. *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994).[15]

Plaintiffs John Doe I and John Doe II assert that their civil rights afforded by the United State' [sic] Constitution have been violated because ASORA constitutes: (1) a law by the state of Alaska that modifies existing or prior contracts in violation of Article I, Section 10; (2) denial of due process and a violation of the Equal Protection Clause guaranteed by the Fourteenth Amendment; (3) an

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[13] *Id.*

[14] http://www.dps.state.ak.us/sorcr/.

[15] The plaintiffs filed their complaint pseudonymously to prevent disclosure of their identities, and the court ordered them to file an amended complaint using their true names. Clerk's Docket No. 62. When the plaintiffs refused to comply, the court dismissed the case, appealed, and the Ninth Circuit Court of Appeals reversed the dismissal for failure to file in the plaintiffs' true names and remanded for reinstatement of the complaint and the preliminary injunction and for further proceedings.

ex post facto law prohibited by Article I, Section 10; (4) an unreasonable search or seizure prohibited by the Fourth Amendment; and (5) an invasion of the plaintiffs' right to privacy. In addition, Jane Doe asserts her own claim that ASORA violates her right to privacy.

In addition, plaintiffs assert numerous pendant state law claims contending that ASORA violates the Alaska Constitution because it constitutes: (1) an invasion of privacy under Article I, Section 22; (2) a denial of due process inconsistent with Article I, Section 7; (3) an *ex post facto* law prohibited by Article I, Section 15; (4) a violation of the Equal Protection Clause guaranteed by Article I, Section 12.

The court shall grant summary judgment under Federal Rule of Civil Procedure 56(c) only if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Summary judgment is required if the non-moving party fails to make a showing sufficient to establish the existence of an essential element and upon which the non-moving party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Defendants assert that they are entitled to summary judgment on plaintiffs' claim that ASORA: (1) is an *ex post facto* law,[16] (2) violates their plea bargain contracts; and

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[16] Defendants also asset that they are entitled to summary judgment on a claim that ASORA violates the Double Jeopardy

(3) violates their right to privacy. Plaintiffs cross-move for summary judgment on all of their claims.

A.

Ex Post Facto Claim

Plaintiffs claim ASORA is an *ex post facto* law. Article I, Section 10, of the United States Constitution provides that no state shall pass any *ex post facto* law. As *ex post facto* law is one "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (*quoting Cummings v. Mission*, 4 Wall. 277, 324-26 (1867)). Therefore, the question is whether the registration and/or the notification provisions of ASORA constitute punishment. The parties cross-move for summary judgment on this issue.

Defendants assert that *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied* ___ U.S. ___, 118 S. Ct. 1191 (1998), is dispositive. In *Russell*, the Ninth Circuit held that the registration and notification provisions of the Washington registered sex offender law did not violate the *ex post facto* clause. Plaintiffs seek to distinguish *Russell* on grounds that the registration and notification

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clause of the Fifth Amendment of the United States Constitution. However, as the plaintiffs' point out, the Does are not challenging ASORA based upon the claim that it violates the double jeopardy clause. The State's motion for summary judgment on the issue that ASORA does not violate the Double Jeopardy clause is denied because that issue is not before the court.

provisions present in ASORA differ significantly from the Washington law analyzed in *Russell*. They assert that even under *Russell*, the ASORA registration and notification provisions constitute punishment and violate the *ex post facto* clause, thereby entitling them to summary judgment as a matter of law.

The court must employ the "intent-effects" test to determine whether ASORA imposes punishment in violation of the *ex post facto* clause. *Russell* 124 F.3d at 1087. This test requires that the court first inquire whether the legislature intended the sanction to be punitive. The "intent" prong deals solely with the declared purpose of the legislature as well as the construction and design of the statute. *Id.* Second, the court must consider whether the sanction is so punitive in effect as to prevent the court from viewing it as regulatory or civil in nature, despite the legislature's intent. *Id.* As to the "effects" prong, a challenging party is required to demonstrate by "the clearest proof" that the statutory scheme is so punitive in effect as to negate the State's non-punitive intent. *Id.*

In *Russell* and *Rowe v. Burton*, the courts considered separately the constitutionality of the registration provisions apart from the constitutionality of the notification provisions. Thus, the court turns first to the registration provisions.

1. Registration Provisions

a. Intent

The court first applies the "intent-effects" test to the registration provisions of ASORA. The court must decide

whether the Alaska legislature intended the registration provisions as punitive.

Russell provides this court with guidance as to what to consider in determining the legislature's intent. The court must look to the language of the statute and the overall design of the registration provisions. In *Russell*, the court first looked to the legislative findings as evidencing an unequivocal regulatory motivation. The Washington findings declare:

> "The legislature finds . . . law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction."

Russell, 124 F.3d at 1087 (*quoting* 1990 Wash. Laws, ch. 3, § 401). Defendants submit that *Russell* is dispositive on the issue that the Alaska legislature did not intend the registration provisions as punitive. According to the defendants, the findings of the Alaska legislature are so similar to those in [sic] presented in Washington, that *Russell* mandates that this court find no punitive intent. Both states' findings focus on the protection of the public. However, as the plaintiffs point out, the findings put forth by the Alaska legislature are much less specific pertaining to the need for registration than are the Washington findings. For example, the Alaska findings simply provide that protection of the public from sex offenders is a primary governmental focus. They seem to be geared more for the notification provisions of ASORA than the

registration provisions now under discussion. Yet, this distinction alone does not evidence a punitive intent.

The next step the court must undertake to determine the legislature's intent is to look to the overall design of the registration provisions. In *Russell*, the Ninth Circuit found that the overall design of the Washington provisions evidenced a regulatory, not a punitive, intent. Crucial to the court's decision was the following. First, the registration provisions did no more than apprise law enforcement officials of certain basic information about an offender living in the area. Second, the registration provisions did not place any restraint on the offenders' movements because they were free to move so long as they notified law enforcement, and they could comply with the registration requirements by simply mailing a written notice to the sheriff. Finally, the court placed importance upon the fact that the information required was not burdensome. *Russell*, 124 F.3d at 1087.

Defendants again argue that *Russell* controls and that the design of ASORA indicates a regulatory intent because there is no evidence of a penal intent. However, *Russell* may be distinguishable on several grounds. First, ASORA's registration provisions do require one to register in person; thereby restraining an offender's movement. Second, the information required as part of registration is slightly more burdensome in that the offender must submit to a photograph and be fingerprinted. While these are distinguishing features, they are not of sufficient weight to require a different result from *Russell* for the following reasons. First, in *Doe v. Pataki*, the Second Circuit, in considering New York's sex offender registration statute, found that the requirement

that a person register in person every 90 days (significantly more onerous than the requirement in Alaska which requires initial registration and registration upon moving) was cumbersome, but not "sufficiently severe to transform an otherwise non-punitive measure into a punitive one." *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997). Second, the additional requirements of being photographed and fingerprinted are not overly burdensome in light of the considerable benefits to law enforcement deriving from having a photograph and fingerprints to aid in finding an individual if suspected of a future crime.

The plaintiffs then offer six additional arguments in support of their proposition that ASORA registration requirements evidence an objective intent to establish a criminal, not a regulatory, statutory scheme. They point to: (1) the placement of the registration provisions of ASORA (AS 12.63.010) in the state's code of criminal procedure; (2) the focus of the statute; (3) the fact that registration constitutes a new form of post-incarceration supervision; (4) the fact that there is no escape from ASORA's application; (5) the legislature's amending the criminal law by making the registration requirements part of any plea agreement and part of any sentence imposed by the sentencing court; and (6) the imposition of a duty on the offender solely as a result of a past conviction.

According to the plaintiffs, placement of the registration provisions in the state's code of criminal procedure evidences an intent to establish a criminal statutory scheme. Although this court concluded in *Rowe* that codification of ASORA in the criminal code was not evidence

of punitive intent, plaintiffs contend that the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), requires this court to hold otherwise. In *Hendricks*, the Supreme Court felt that "Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code." *Hendricks*, 521 U.S. at 361. It follows then, according to the plaintiffs, that placement of the registration provisions of ASORA in the code of criminal procedure establishes a punitive intent.

Defendants rebut this argument on three grounds. First, they submit that while codification of a statute in a particular title is evidence of a legislative intent, it is not conclusive. In support, they refer the court to *Pataki* 120 F.3d at 1278, where the fact that the New York sex offender registration law was codified in "corrections law" was of little relevance to the determination of legislative intent. Second, defendants note that AS 12 is not limited only to matters directly related to the prosecution and punishment of criminal offenses. For example, the code of criminal procedure contains laws relating to medical examiners and actions for post-conviction relief which are civil actions.[17]

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[17] Defendants argue that the legislature's codification of a particular statute should not be dispositive of the legislature's intent because the revisor of statutes, not an elected official, has the power to renumber and rearrange the legislature's own codification. However, this argument is weak because the fact remains that the legislature itself intended to place the registration provisions within the code of criminal procedure.

Washington designated its registration provisions as Wash. Rev. Code § 9A.44.130-.140, a part of the Washington Criminal Code. The court in *Russell* did not address this issue, nor did it appear concerned about it. This court adheres to its earlier decision that the Alaska Legislature's placement of the registration provisions in the code of criminal procedure is a practical, logical place to locate the registration requirement.

Second, plaintiffs contend that the focus of the registration provisions evidence an intent to establish a criminal statute because ASORA is aimed at sex offenders and not at an activity from which the offender should be barred because of relevant past conduct. They cite *Fleming v. Nestor*, 363 U.S. 603 (1960), for the proposition that if the law is aimed at individuals, rather than an activity from which the individuals should be barred, the law is punitive, not regulatory. *Id.* at 613-14.

However, as the defendants point out, the Supreme Court noted in *Nestor* that no single, clear basis for determining whether a statute is regulatory or punitive can be derived from the cases leading up to *Nestor* since each case turns on "its own highly particularized context." *Id.* at 616. Moreover, the Supreme Court has upheld laws aimed at individuals rather than at an activity from which the individual should be barred. The Supreme Court did so in *Nestor* where it upheld a statute that terminated social security benefits for persons deported for previous participation in communist activities. *Id.* at 612.21. *See also DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding a statute that prohibited felons from working for waterfront unions).

The court finds that while the registration provisions are aimed at sex offenders rather than an activity, such is at best slight evidence of a legislative punitive intent.

Third, plaintiffs assert that the registration provisions of ASORA are a criminal statutory scheme, that ASORA is nothing more than a new form of post-incarceration supervision because it requires periodic reporting, notice of change of employer, and notice of change of residence, all of which are conditions imposed on post-incarceration in Alaska. Moreover, ASORA is administered by a criminal justice agency – the state troopers. Defendants do not directly rebut this argument, probably because the registration requirements can be construed as a form of post-incarceration supervision. The Ninth Circuit in *Russell* did not address this issue. This court finds that the registration requirement is supervisory and is some evidence of a punitive intent.

Fourth, plaintiffs argue that the fact that there is no escape from ASORA's application reflects the legislature's intent to enact a criminal statutory scheme. However, as the defendants submit, registration statutes have long been recognized as regulatory, not punitive measures. They refer the court to numerous cases where the Supreme Court has upheld the use of registration statutes. Finally, the defendants remind the court that it previously noticed that "[r]egistration is not a concept which this court perceives to be imbued by history with a punitive connotation." *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994). ASORA is essentially regulatory. Registration *per se* is not punitive. Although neither party points it out, it is possible to escape ASORA's application, although not initially. The registration provisions do end

after 15 years if a person have been convicted of only one offense. AS 12.63.020(a).

Fifth, plaintiffs submit that the fact that the legislature simultaneously amended the criminal law to make registration provisions part of any plea agreement and part of any sentence imposed by the sentencing court evidences a penal intent. This argument puts the cart before the horse. The legislature enacted the registration provisions in response to their findings that registration would make it easier for law enforcement. Notifying those persons who are newly convicted of sex offense crimes that they will be subject to these registration provisions as a result of their conviction is the appropriate and fair thing to do. It does not establish that the legislature intended the registration provisions to be punitive.

Sixth, plaintiffs submit that the imposition of a duty (the duty to report to the authorities, the duty to provide one's fingerprints, the duty to be photographed, and the duty to provide information) on the offender, which is imposed solely as a result of a past conviction, is clear evidence of an intent to establish a criminal statutory scheme because laws which compel the doing of an act, after the fact, violate the prohibition of the *ex post facto* clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

The plaintiffs misstate the scope of the *ex post facto* clause. The focus is upon laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). ASORA does not define a crime. Whether or not ASORA imposes punishment retroactively begs the question

under analysis. For purposes of evaluating the legislature's intent, the duty to register is not inherently punitive. It is not evidence of punishment because ASORA is just another regulatory disability – like the loss of the right to vote or deportation – which results from a prior conviction. The fact that a conviction gives rise to the duty to register does not bespeak a punitive intent. Rather, imposing the duty of registration merely addresses the legislative findings that offenders pose a high risk of re-offending after release from custody.

In summary, the court finds no evidence of penal intent in the Legislative findings, in the Alaska Legislature's placement of the registration provisions in the code of criminal procedure, in notifying those persons who are newly convicted of sex offense crimes of the applicability of the registration provisions, or in imposing a regulatory disability upon sex offenders to register. However, the focus of ASORA on sex offenders and not at an activity from which the offender should be barred because of relevant past conduct is slight evidence of punitive intent and the registration requirements are in fact a form of post-incarceration supervision.

Weighing all of the foregoing, the court concludes that the legislature did not act with punitive intent in enacting the registration provisions of ASORA.

b. Effect Prong

The court next considers the second part of the "intent-effects" test. Plaintiffs must show by the "clearest proof" that the registration requirement is "so punitive" in effect that it overcomes the non-punitive legislative

intent. If they do so, the law must be considered an *ex post facto* law in violation of the Constitution. In determining whether the plaintiffs have met their burden, the court must consider the *Mendoza-Martinez* factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The court may consider whether:

> [1] the sanction involves an affirmative disability or restraint, [2] it has historically been regarded as a punishment, [3] it comes into play only on a finding of *scienter*, [4] its operation will promote the traditional aims of punishment-retribution and deterrence, [5] the behavior to which it applies is already a crime, [6] an alternative purpose to which it may rationally be connected is assignable for it, and [7] it appears excessive in relation to the alternative purpose assigned. . . .

Id. (footnotes omitted). The Supremé Court recently emphasized that no one factor should be considered dispositive. *Hudson v. United States*, ___ U.S. ___, 118 S. Ct. 488, 494 (1997).

The first *Mendoza-Martinez* factor is whether the registration provisions involve an affirmative disability or restraint. The plaintiffs assert that ASORA amounts to an affirmative disability and restraint because requiring them to register deprives them of rights "to which they would otherwise have been entitled, and the deprivation of those rights is caused solely by the past criminal conviction."[18] The Ninth Circuit in *Russell* concluded

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[18] Clerk's Docket No. 107 at 61.

without analysis that the Washington registration provisions did not impose an affirmative restraint or disability. *Russell*, 124 F.3d at 1089. This court has previously held that registration:

> does not affirmatively limit plaintiffs. It does not disqualify the registrant from any activity, personal or professional.

Rowe, 884 F. Supp. at 1378. Finally, as defendants point out, the registration provisions are not significantly more of an affirmative restraint than the provisions for securing an Alaska driver's license. The court concludes that the registration provisions do not impose an affirmative disability or restraint. This factor weighs in favor of a finding of no punitive effect.

The second *Mendoza-Martinez* factor considers whether registration has historically been regarded as punishment. Plaintiffs contend that it has. However, this argument was directly addressed and dismissed in *Russell* when the court stated that registration provisions are "typically and historically a regulatory measure." *Russell*, 124 F.3d at 1089. Furthermore, that court went on to cite numerous cases where registration provisions have overwhelmingly been sustained as constitutional. In sum, this factor weighs in favor of a conclusion of no punitive effect.

The third *Mendoza-Martinez* factor asks the court to weigh if registration only comes into play on a finding of *scienter*. The plaintiffs contend that since the registration provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*.

In rebuttal, defendants submit that registration is not based on a finding of *scienter,* but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The requirement to register is based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. Therefore, the court concludes that ASORA's registration provisions do not have a punitive effect because they are not based alone upon a finding of *scienter.*

In analyzing the fourth *Mendoza-Martinez* factor, the court must consider whether the registration provisions promote the traditional aims of punishment-retribution and deterrence. Plaintiffs assert that the registration provisions punish and deter crime.

However, as the defendants argue, the fact that registration has a deterrent effect (which the defendants concede the registration requirements may have) does not automatically render an otherwise regulatory sanction as punitive. *Kansas v. Hendricks,* 521 U.S. 346, 361. This is true because deterrence can serve both civil and criminal goals. Moreover, for a state action to be deemed retributive, it must amount to a deliberate imposition by the state of some measure intended to chastise, deter, or discipline. *Doe v. Kelley,* 961 F. Supp. 1105, 1111 (W.D. Mich. 1997). Plaintiffs have put forth no evidence of a deliberate intent to discipline.

The existence of some deterrent effect does not make the registration provisions punitive in nature. Deterrence alone, particularly absent a showing of retribution, is

insufficient without more to render the provisions as punitive.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. Plaintiffs assert that since the registration provisions apply only to those persons who have been convicted of a criminal offense, it is conclusively established that the behavior to which ASORA applies is already a crime. However, the crime of failing to register under ASORA constitutes a separate offense and "[I]t is hornbook law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct [failing to register under ASORA] took place after the law was passed." *Russell,* 124 F.3d at 1088-89. Therefore, the court finds no evidence of a punitive effect after considering this factor.

The sixth *Mendoza-Martinez* factor looks at the alternative purposes to which the registration provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the registration provisions – namely, the protection of the public from sex offenders. The plaintiffs disingenuously dispute the validity of this purpose. The evidence before the legislature and its findings strongly support the need for the protection of the public. Therefore, this factor supports a conclusion that the registration provisions do not have a punitive effect.

The seventh and final *Mendoza-Martinez* factor analyzes whether the registration provisions appear excessive in relation to the alternative purpose.

Plaintiffs argue that the registration provisions are excessive in relation to the purpose because there is no means of being relieved of the registration requirement. The plaintiffs exaggerate. A person who has only one conviction can be relieved from the registration requirements after 15 years. While 15 years is a long time, it is a sufficient amount of time in which to require a person to register and to ensure that the person is unlikely to re-offend. This finding is consistent with *Russell* where the Ninth Circuit held that requiring less serious offenders to register for 10 or 15 years was not excessive given the state interest at stake. *Russell,* 124 F.3d at 1089. Therefore, the court concludes that this factor weighs in favor of finding no punitive effect.

In summary, the court has determined that: (1) the registration provisions do not impose an affirmative disability or restraint upon the plaintiffs; (2) the registration provisions have not traditionally been considered to be punishment; (3) the registration provisions are not based only upon a finding of *scienter;* (4) the deterrence factor in the registration provisions, absent a showing or retribution, was insufficient to render the registration provisions punitive; (5) the behavior to which the sanction (failure to register) applies is a separate offense from the underlying crime; (6) the evidence before the legislature and its findings strongly support the need for the protection of the public; and (7) the registration provisions are not excessive in relation to the purpose given the state interest (protection of the public from the risk of re-offending sex offenders). Based on the foregoing, the court concludes that the plaintiffs have not shown by the clearest proof that the registration provisions are so punitive as to

negate the legislature's non-punitive intent. Therefore, the registration provisions do not constitute punishment violative of the *ex post facto* clause. Defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the registration requirements is granted. Plaintiffs' cross-motion for summary judgment is denied.

2. Notification Provisions

a. Intent

The court must consider whether the legislature intended the notification provisions to be punitive by looking to the declared purpose of the legislature as well as the construction and design of the notification provisions. The legislative findings make plain that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." § 1, Ch. 41 SLA 1994. This suggests a regulatory, not a punitive purpose.

Plaintiffs urge three reasons why the construction and design of the notification provisions should be held to evince punitive intent on the part of the Alaska Legislature. First, plaintiffs contend that the notification provisions are located in the Alaska criminal code; thereby evidencing a punitive intent. Plaintiffs are wrong. The notification provisions of ASORA, AS 18.65.087, are codified in the Health, Safety, and Housing Code. Therefore, it cannot be said that the placement of the notification provisions within the code establishes a punitive intent.

Second, plaintiffs assert that since the legislature amended the criminal law by making the public notification requirements part of any plea agreement and part of

any sentence imposed by the sentencing court, it evidences the legislature's intent to enact a punitive law. However, as is more fully discussed *supra* under the registration provisions, notifying persons who are convicted of sex offense crimes that they will be subject to public notification as a result of their conviction is the appropriate and fair thing to do.

Third, plaintiffs submit that an objective intent to establish a criminal statutory scheme is established because ASORA has insufficient limitations on public notification. Without specific limitations on how, when, and what information is released to the public, the release of all information on all offenders evidences an intent to impose punishment.

This argument requires some scrutiny. In *Russell*, the Ninth Circuit found that Washington's law which had stringent restrictions[19] on the release of registration information was not punitive because "[a] law designed to punish an offender would not contain strict limitations on notification." 124 F.2d at 1091. As the plaintiffs point out, ASORA contains no limitations on notification. Rather than limit notification to a specific geographic area like Washington does, under ASORA, the information has been published on the "modern day soap-box"[20] for the

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[19] Under Washington law, notification occurs only when the release of information is necessary for public protection. The notification occurs two weeks in advance of an offender's release from prison to allow time for the community to prepare for the release. ASORA does not have these protections.

[20] The United States Supreme Court recently compared the Internet to the 18th century soap-box. The court held that the

entire world to view. Second, under the Washington law public notification is not automatic like it is in Alaska. In Washington, an individual determination is made to ascertain whether a sex offender poses a threat to the community. In Alaska, all sex offenders are subject to public notification regardless of their proclivity for re-offending and their level of threat to the community.

Defendants rebut this argument in two ways. First, they assert that plaintiffs ignore the fundamental difference between the notification provisions of the Washington statute and ASORA – namely, that Washington provides for an affirmative notification, whereas ASORA allows passive disclosure. The impact of a government agent going door-to-door to inform residents that a sex offender is in their midst is very different and more intrusive than making public information available to those who want it. The passive disclosure required by ASORA is no more suggestive (and could be viewed as less suggestive) of a punitive intent than Washington law which imposes disclosure upon all in a given area irrespective of whether they need or care to move. Under the notification provisions of ASORA, only those who know that they can access such information and care to do so are aware of sex offenders in their midst.

Second, defendants submit that the plaintiffs have failed to establish that the extra-Alaska dissemination via the Internet contradicts the legislature's regulatory intent. However, ASORA does seem to cast a much wider net

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Internet allows a person to become a "town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, ___ U.S. ___, 117 S. Ct. 2329, 2344 (1977).

than is absolutely necessary. The fact that a statute is over-broad in some respects does not, without more, derogate from its non-punitive goals:

> The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.

Pataki, 120 F.3d at 1283. Assuming a choice between affirmative publication to a narrower population and less intrusive publication of registration information to a wider population, only the most concerned of whom are likely to acquire actual knowledge of registration information, the legislative choice made by Alaska in ASORA does not appear punitive.

In summary, the legislative findings, the fact that the notification provisions are codified in the Health, Safety, and Housing Code, and the requirement that persons who are newly convicted of sex crimes must be told of the notification provisions do not evidence a punitive intent on the part of the legislature. Furthermore, the use of a broad but passive notification does not evidence a punitive intent by the legislature. Based upon the foregoing, the court concludes that the legislature did not intend the notification provisions of ASORA to be punitive in nature.

b. Effect

Plaintiffs submit that they have established by the clearest proof that the notification provisions are so punitive in effect that this court is prevented from viewing

them as regulatory or civil in nature, regardless of the legislature's intent. The court must consider the *Mendoza-Martinez* factors in light of the notification provisions of ASORA.

First, plaintiffs submit that the notification provisions impose an affirmative disability or restraint on sex offenders because they provide broad public access to the information with no prior determination of the need for the disclosure and no restrictions on use of the information. In support, plaintiffs refer the court to *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2508 (1997). In *Myers*, the Kansas Supreme Court concluded that the public disclosure provisions imposed an affirmative disability or restraint because unrestricted public access to the registered information leaves open the possibility that the registered offender will be subject to public stigma and ostracism. *Id.* The Ninth Circuit in *Russell* noted, however, that the court could not consider the possible " 'vigilante' or illegal responses or citizens to notification." *Russell*, 124 F.3d at 1092. Therefore, the court finds that the public notification provisions do not impose an affirmative disability.

Second, plaintiffs argue that public notification provisions have historically been treated as punishment. The Ninth Circuit in *Russell* concedes that historical punishments such as "pillorying, branding, or the sanction described in Hawthorne's *The Scarlet Letter*" are similar to the public notification provisions of sex offender laws. *Russell*, 124 F.3d at 1091. Moreover, "[n]otification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities." *Id.* at 1092. Yet the court noted that while punishment in the past

often relied upon humiliation, humiliation alone does not constitute punishment because there must be an intent to punish. *Id.* The court went on to conclude that give Washington's restrictions on disclosure, there was no intent to punish; thus, no 'clear proof' of an overwhelming punitive effect. *Id.* Under ASORA, access to registration information is broad, but it is a passive form of notice. The information is available to those who need and care to inquire, and this too fails to constitute clear proof of an overwhelming punitive effect.

The court concludes that even though the public notification provisions may humiliate sex offenders, the provisions do not constitute punishment since there has been no showing of an intent to punish.

The third *Mendoza-Martinez* factor asks the court to consider if the notification provisions only come into play on a finding of *scienter.* The plaintiffs contend that since the notification provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter.* In rebuttal, defendants submit that, like the registration provisions, the notification provisions are not based on a finding of *scienter,* but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The public notification provisions are based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. The court concludes that ASORA's notification provisions do not have a punitive effect because they are not based alone upon a finding of *scienter.*

Fourth, the plaintiffs do not expressly address the retribution and deterrence factor in light of the notification provisions. But the defendants contend that the deterrent effect of disclosure is little different from the deterrent effect of registration. Single disclosure involves only information that is mostly available from other public sources – voter records and criminal records – the defendants argue that it would be illogical to conclude that disclosure becomes retributive simply by making the information more readily available to the public.

Affirmative notification like that in Washington clearly has a deterrent effect. The court is unconvinced that creating a repository of information regarding sex offenders and making that information available to the public under Alaska law will be as effective a deterrent. In *Russell,* the Ninth Circuit found that while the Washington notification provision had a deterrent effect, it did not implicate the other goal of punishment (retribution) because "it [does not] label [ ] the offender as more culpable that before (though his or her culpability may be more widely publicized)." *Russell,* 124 F.3d at 1091. Thus the court finds that while the Alaska notification provisions may serve as a deterrent, they do not have a retributive effect since the notification provisions do not seek to punish but rather to make more readily available that which is already public information.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. The parties as well as the court in *Russell* do not directly address this factor. However, under Alaska law, the notification provisions apply only to those persons who have been convicted of a criminal offense. Therefore,

the court concludes that the [sic] since the sanction of public notification applies to those already convicted of a crime, this factor weighs in favor of a finding of punitive effect.

The sixth *Mendoza-Martinez* factor looks at the alternative purposes to which the notification provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the notification provisions, namely, the protection of the public. Providing access to a registry of sex offenders does allow the public to protect itself if it so chooses; thus, it appears rationally related. The court therefore finds that because the alternative purpose (protection of the public) is served through the Alaska notification provisions, there is no punitive effect.

Finally, the parties consider whether the notification provisions appear excessive in relation to the alternative purpose.

Plaintiffs assert that the notification provisions are excessive in relation to serving the purpose of public notification. In support, they rely upon *Russell* where the Ninth Circuit found that the Washington act was not excessive because it was narrowly tailored and strictly limited so as to achieve the goals of protecting the community from persons who had been determined to pose an actual threat. *Russell*, 124 F.3d at 1089-1091. In response, the defendants argue that the Washington safeguards are necessary only because the Washington statute requires that state agents actively go into a community and notify citizens of the presence of certain sex offenders. The court finds that if it is not excessive to knock on people's doors, then compiling information

under ASORA and making the collected data more readily available to those who need and care to know cannot be considered excessive.

In summary, after analyzing the *Mendoza-Martinez* factors in light of Alaska's public notification provisions, the court concludes that the following indicates a finding that the public notification provisions of ASORA do not have a punitive effect because: (1) providing unrestricted access to the information does not impose an affirmative disability; (2) even though the public notification provisions may humiliate sex offenders, they do not constitute punishment since there has been no showing of an intent to punish; (3) the provisions are not based alone upon a finding of *scienter*; (4) while the provisions serve as a deterrent, they are not retributive; (5) protection of the public is served by the public notification provisions; and (6) the provisions are not excessive in relation to serving the purpose of protecting the public. The ASORA notification provisions have application only to those convicted of a crime.

Based upon the foregoing, the court finds that the plaintiffs have not established by the *clearest proof* that ASORA's notification provisions are so punitive in effect as to overcome the non-punitive, express legislative intent. Therefore, defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the notification provisions is granted. Plaintiffs' cross-motion for summary judgment on this subject is denied.

B.

Impairment of Contracts Clause – Violation of Article I, Section 10

Plaintiffs also move for summary judgment contending that retroactive application of ASORA is barred by Article I, Section 10, of the United State Constitution. Plaintiffs assert that ASORA, by requiring them to register as sex offenders and by providing public disclosure of information, violates the constitutional prohibition of impairment of contracts since their plea agreements did not contain such requirements.

The parties agree, without citing any authority, that the test for determining whether ASORA impairs the Does' plea agreements is whether ASORA materially altered or modified the contract to the extent that a party to the contract is deprived of rights accruing under the original agreement. The parties also seem to agree that this is an issue of Alaska law, not federal law. But the defendants contend that because it is a question of Alaska law, this court lacks jurisdiction to consider plaintiffs' claim because it is barred by the Eleventh Amendment.

The appropriate test for use by this court is not set forth or argued by either of the parties. Article I, Section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " although the language of the Contracts Clause appears to be absolute, the Supreme Court has recognized that:

> the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the

> promotion of the . . . good of the public, though contracts previously entered into between individuals may thereby be affected.

Manigault v. Springs, 199 U.S. 473, 480 (1905).

The three-part inquiry established by the Supreme Court to determine whether a state law violates Article I, Section 10, requires this court to consider whether: (1) the state law has operated as a substantial impairment to the rights owing to a plaintiff under a contractual relationship; (2) assuming a substantial impairment, the state has demonstrated that a significant and legitimate public purpose justifies the regulation; and (3) the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *United State Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

For purposes of this discussion, the court assumes, without deciding, that the first *United States Trust Co.* factor (impairment of contract rights) is established. Even if ASORA is considered as a substantial impairment, ASORA was enacted in response to the sexual abuse crisis that exists in Alaska and is intended and designed to protect the public. This is clearly a significant and legitimate public purpose justifying the regulation. Finally, and as discussed at length above, the registration and notification provisions are reasonable and rationally related to the purpose of protecting the public from sex offenders.

Based upon the foregoing, the court concludes that ASORA does not violate Section 10 of Article I of the

United States Constitution. Therefore, defendants' motion for summary judgment on this issue is granted, and plaintiffs' cross-motion is denied.

C.

Right to Privacy

Plaintiffs assert that the public disclosure provisions of ASORA violate the right to privacy under the United States Constitution and under the Alaska Constitution. According to Doe I and Doe II, public notification infringes upon their right to "personal privacy and dignity."[21] Jane Doe alleges that public notification infringes upon her right to privacy because it causes "public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register."[22] Because the privacy rights of Doe I and Doe II differ from those asserted by Jane Doe and because of concerns over whether Jane Doe even has standing to assert her claims, the court addresses these issues individually.

1. Privacy Claims under the United State Constitution

a. John Doe I and John Doe II

In *Whalen v. Roe*, the United State Supreme Court recognized that the Constitution protects two types of privacy interests: (1) "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in

[21] Clerk's Docket No. 107 at 31.

[22] Clerk's Docket No. 107 at 32.

independence in making certain kinds of important decisions." 429 U.S. 589, 599-600 (1977). Plaintiffs allege that state dissemination of criminal history information, current addresses, current place of employment, and "state sponsored intrusions into the family home by neighbors and vigilantes"[23] implicates both types of privacy recognized in *Whalen* because it constitutes the disclosure of personal matters and affects the plaintiffs' independence in making certain kinds of decisions such as where to live and work and, in the case of Jane Doe, whom to marry.

Defendants contend that the information required as part of the notification process is already a matter of public record and that which is in the public record is not protected by any federal right to privacy; therefore, they are entitled to judgment as a matter of law. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976), *cert denied*, 429 U.S. 855 (1976). Moreover, the defendants assert that a person does not have a reasonable expectation of privacy as to his physical characteristics, including one's likeness. *United State v. Dionisio*, 410 U.S. 1, 7 (1973).

Plaintiffs put forth several arguments supporting their motion for summary judgment on the grounds that ASORA goes beyond merely releasing information pertaining to Doe I and Doe II's conviction, matters of public record, and their photos, thus violating their right to privacy.

First, under the public notification provisions, a person's current address and place of employment which is not part of the criminal public record is disclosed. In fact,

[23] *Id.* at 31.

as the plaintiffs point out, John Doe I and Doe II's criminal files which are over ten years old contain neither their current home addresses nor their places of employment. Therefore, Doe I and Doe II's addresses and places of employment are not part of the public record. They refer the court to *United State Department of Defense v. FLRA*, 510 U.S. 487 (1994), where the Supreme court held that the federal Privacy Act and the Freedom of Information Act prohibited federal employers from disclosing employees' addresses without their consent because a disclosure of home addressees could lead to the intrusion or misuse of that information, thereby constituting a violation of the right to privacy. Finally, the Does distinguish *Russell* and point out that ASORA has none of the protections which led the Ninth Circuit to find that the public notification provisions of the Washington registration act did not violate the right of privacy because the act provided due process to the offender before the information could be release, not all offenders fell within the public notification provisions, and the information disseminated was severely limited. *Russell*, 124 F.3d at 1094. The Washington law only provided that the general vicinity where the offender resided be released, not the specific address as is done under ASORA. The Ninth Circuit found that the fact that an offender's exact address was not released was important and stated that the Washington act did not violate the right of privacy because "the collection and dissemination of information is carefully designed and narrowly limited." *Id.* at 1093.

The defendants rebut on four grounds. First, they contend that *Russell* – which found no violation of the right to privacy – controls. Moreover, the court in *Russell*

cited *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995) (*en banc*), for its discussion of the common law invasion of privacy. *Johnson* noted that neither street address nor job title could be characterized as private or highly intimate or embarrassing facts about a person's private affairs such that publication would be highly objectionable to a person of ordinary sensibilities. 47 F.3d 716 at 733. Therefore, disclosure of a sex offender's street address or employment should not be considered information protected by the right to privacy under the United State Constitution.

Second, defendants contend that no personal information (information that is private) is disclosed under ASORA because all of the information disclosed under ASORA is available in public records, and they point to the fact that the plaintiffs' addresses are available publicly through voter registration rolls and Alaska Permanent Fund Dividend records.[24] Therefore, defendants assert, Doe I and Doe II have no reasonable expectation of privacy in that which they knowingly expose to the public. The defendants distinguish *Department of Defense v. FLRA* on the grounds that the privacy interest recognized in this case is rooted in federal statutes, not the federal constitution. Finally, defendants contend that the Alaska Legislature found that a sex offender's privacy interest is "less important than the government's interest in public safety" and that "release of certain information about sex offenders to . . . the general public will assist in protection the public safety." § 1, Ch. 41, SLA 1994. This legislative determination, under *Nestor*, 363 U.S. at 617, is

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[24] Although they do not provide proof of this.

subject to attack only upon the basis that it is irrational, which the court finds the plaintiffs have not shown.

This court previously rejected plaintiffs' privacy argument, holding that the right to privacy "does not attach to matters already within the public domain." *Rowe*, 884 F. Supp. at 1384. Here, the court is persuaded by defendants' arguments.

Because the information subject to disclosure is either a matter of public record or is not "highly intimate," the court concludes that the public notification provisions of ASORA do not violate Doe I and Doe II's right to privacy under the United States Constitution. Therefore, defendants' motion for summary judgment on Doe I and Doe II's claims that the public notification provisions of ASORA violate the right to privacy under the United States Constitution is granted. Plaintiffs' cross-motion on this issue is denied.

b. Jane Doe

Jane Doe asserts a claim based upon 42 U.S.C. § 1983. In order to maintain an action under 42 U.S.C. § 1983 she must establish: (1) that the defendants deprived her of a right secured by the Constitution and laws of the United States, and (2) that the defendants deprived her of this right under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Jane alleges two injuries in fact: (1) violation of her right to privacy under the United States Constitution, and (2) violation of due process because of a deprived liberty interest, *i.e.*, her state granted right of privacy. The crux

of Jane Doe's claim is that she will be injured by release of the information regarding her husband and by release of her home address. She has not shown any actual injury to date, only because an injunction has been in effect since the inception of this lawsuit. Plaintiff refers the court to sealed exhibits which show that family members or registered sex offenders have suffered harm and been stigmatized.[25] In response, defendants contend that Jane Doe lacks standing to raise such a claim and, even is she has standing, that she is not entitled to summary judgment.

The defendants argue that Jane Doe lacks standing to challenge ASORA because she is not subject to ASORA. She is not a sex offender; she is married to one. Moreover, her affidavit does nothing more than speculate that she "will be seriously harmed" by disclosure of her husband's conviction as a sex offender. Finally, they note that the harm alleged to have been suffered by family members of registered sex offenders is really an unavoidable consequence that resulted from a criminal conviction.

The assertion of a loss of constitutional rights constitutes an injury for purposes of standing. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, Jane Doe, who is asserting a violation of her constitutional rights caused by ASORA, has standing to proceed although she is not a sex offender. *Jane Doe v. Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990).

Plaintiff moves for summary judgment on her claims. She urges that her expectation of privacy, unlike that of

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[25] Clerk's Docket No. 101, Exhibits 12, 13, 15 & 16.

Doe I and Doe II, has never been lowered as a result of criminal conduct and that the information which is released as part of ASORA's notification provisions and which is not part of the public record causes public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register.

Under ASORA, the defendants do not disclose any private information pertaining directly and uniquely to Jane Doe. Moreover, this situation is distinguishable from that presented in *Doe v. Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990), where the court found that the government violated the privacy rights of a wife when it publicly disclosed that her husband had AIDS because "[t]he stigma of AIDS extends to all family members whether or not they actually have the disease." *Doe*, 729 F. Supp. at 386. Any stigma of being a sex offender extends only to the sex offender and not to the sex offender's family because being a sex offender is not an infectious disease which could conceivably be passed to one's spouse. Therefore, the court concludes that while Jane Doe has standing to assert a violation of her constitutional right to privacy, she has not come forward with any evidence tending to show that her several or separate privacy rights have been violated. Defendants' motion for summary judgment as to Jane Doe's civil rights claim is granted, and Jane Doe's motion for summary judgment is denied.

2. Privacy Claims under the Alaska Constitution

The court next turns to Doe I and Doe II's claim that ASORA's public notification provisions violate the

express guarantee of a right to privacy afforded by the Alaska Constitution. In their cross-motion for summary judgment, plaintiffs assert that they are moving for summary judgment on this issue. Defendants rebut, arguing that this court lacks subject matter jurisdiction to hear this claim based upon Eleventh Amendment immunity.[26]

Plaintiffs submit that defendants are "belatedly recharacterizing the [plaintiffs'] claims to be claims based on a violation of state law, which they are not."[27] Rather, plaintiffs say that they are not directly asserting state law claims arising under the Alaska Constitution. Plaintiffs' assertion is contradicted by their amended complaint. Plaintiffs expressly title Count III of their amended complaint "Pendant State Law Claims for Declaratory Judgment"[28] which includes an allegation that ASORA violates plaintiff's expectation of privacy protected by Article I, Section 22, of the Alaska Constitution.

In their Count III, plaintiffs have plainly asserted against the defendants a state claim. State law claims for violation of a right to privacy arising under the Alaska Constitution cannot be considered by this court because

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[26] Eleventh Amendment immunity does not extend to suits seeking declaratory and injunctive relief against state officers in their individual capacities for their failure to protect federal statutory or Constitutional rights. Therefore, the court can hear plaintiffs claims base on violations of federal laws.

[27] Plaintiffs' Reply Memorandum at 3, Clerk's Docket No. 113.

[28] Clerk's Docket No. 10.

they are barred by the Eleventh Amendment.[29] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984). Defendants are granted summary judgment as to plaintiffs' state law claims.

D.

Due Process

The United States Constitution protects persons from the deprivation of liberty without due process of law. U.S. Const. Amend. XIV. Doe I and Doe II contend that ASORA deprives them of due process of law in violation of the Fourteenth Amendment of the United States Constitution on the following grounds: (1) because the United State Constitution grants them a right to privacy, a liberty interest, which is violated by the release of information under the notification provisions of ASORA without sufficient due process; (2) the Alaska Constitution expressly guarantees a right of privacy, therefore a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest;[30] and (3) the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the state attaching conditions on that reintegration and by the state's broadcasting private information to the world which interferes with the registrant's ability to

[29] This also applies to plaintiffs' claims that ASORA violates the Alaska Constitution because it constitutes a denial of due process inconsistent with Article I, Section 7, an *ex post facto* law prohibited by Article I, Section 15, and a violation of the equal protection clause guaranteed by Article I, Section 12.

[30] Jane Doe also asserts this claim.

work, seek housing, and to interact with other members of the community. The parties cross-move for summary judgment on the claims.

Because this court found that none of the plaintiffs have a privacy interest protected by the United State Constitution, the court finds no liberty interest at stake. This is consistent with *Russell*. 124 F. 3d at 1094. Therefore, defendants' motion for summary judgment . this issue is granted and plaintiffs' cross-motion is denied.

The crux of plaintiffs' second ground for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution expressly guarantees a right of privacy, therefore, a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest.

Defendants dismiss this argument on the basis that plaintiffs are trying to disguise a state law claim barred by the Eleventh Amendment and defendants elect not to address the argument at all. However, an alternative way for litigants to bring state law claims into federal court is to argue, as plaintiffs have done, that the state law, here the Alaska Constitution, gives rise to a liberty interest protected by the Due Process Clause. Edwin Chemerinsky, *Federal Jurisdiction*, § 7.5.

According to the plaintiffs, this creates a federally protected liberty interest. In support, they refer to two Alaska Supreme Court cases which concluded that the right to privacy is liberty interest. *See Breese v. Smith*, 501 P.2d 159 (Alaska 1972), and *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The crux of the plaintiffs' claim is that the

legislature has done what the voters had intended Article I, Section 22, to prevent. By releasing sex offenders' home addresses, ASORA invaded the offenders' right to live peaceably in their homes, their right to association with family and friends, and their right to work. Moreover, this invasion of the right to privacy is done without notice and opportunity to be heard and without first making a determination of the need for each disclosure by finding that the individual subject to disclosure actually presents a threat to the public. Thus, plaintiffs posit, ASORA denies due process.

The court in *Russell* found no due process violation because they found no violation of the right to privacy. However, the court in *Russell* was confronted only with a challenge to the United States Constitution. The situation in Alaska may warrant a different result. First, the Alaska Constitution, unlike the United States Constitution, expressly provides for a right of privacy.

Under Alaska law, this gives rise to a liberty interest. Further, the Washington law provides for a notice and opportunity to be heard before public disclosure is made.

The test for determining what process is due an individual subject to a possible deprivation of a protected liberty interest is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court must consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards: and (3) the defendant's interest, including the function involved and the fiscal and administrative burdens that the additional

or substitute procedural requirements would entail. 424 U.S. at 335. The parties provide the court with no appropriate analysis of the facts of this case using the test set forth in *Mathews*. Therefore, plaintiffs' motion for summary judgment on this issue is denied with leave to renew. Defendants' motion for summary judgment on the grounds that plaintiffs' due process claim is barred by the Eleventh Amendment is denied.

Plaintiffs' third grounds for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the defendants' attaching conditions on that reintegration and by the state's release of information which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community.[31]

Article I, Section 12, of the Alaska Constitution has been interpreted as granting to an offender the right to rehabilitate and reintegrate with all those rights possessed by any other member of the public:

> the public is not the sole beneficiary of this constitutional requirement. The constitution speaks of penal administration being based on the "principle of reformation." Reformation relates to something being done to rehabilitate the offender into a noncriminal member of society. True, society will benefit from this, but so will the offender since, to the extent that he is

[31] Defendants again elect not to address this argument and instead rely upon the fact that plaintiffs are merely disguising a state law claim barred by the Eleventh Amendment.

> rehabilitated into a law-abiding person, his inherent dignity as a human being will be enhanced. He will be the object of respect, rather that of fear and loathing by his fellow citizens, and to that extent, will benefit from the sense of personal satisfaction enjoyed by those who live decent lives, unsullied by disobedience and rebellion against the laws by which we govern ourselves in a peaceful and tranquil society.

Abraham v. Alaska, 585 P.2d 526, 531 (Alaska 1978).

Therefore, the gravamen of plaintiffs' argument is that Doe I and Doe II had a federally protected right to meaningful access to rehabilitation and to full integration which includes the right to unconditionally reenter society with all civil rights restored and to then live a normal life and not be the object of fear or loathing by fellow citizens. ASORA allegedly violates plaintiffs' reentry rights from a federal constitutional perspective by placing conditions on that reentry by requiring persons convicted of sex offenses to register with the authorities and to periodically report to the authorities as if they were on court probation without an opportunity to be heard.

Because the parties again failed to provide the court with an analysis of this argument and the pertinent facts in this case in light of the framework established by the United State Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the court denies plaintiffs' motion for summary judgment with leave to renew.

E.

Fourteenth Amendment – Equal Protection
and
Fourth Amendment – Search and Seizure

Although plaintiffs contend they are moving for summary judgment on all of their claims, plaintiffs put forth no discussion of their claim that ASORA violates the equal protection clause of the Fourteenth Amendment. Plaintiffs also fail to provide a discussion of their claim that the fingerprinting and photographing requirements of ASORA violate the Fourth Amendment of the United State Constitution.

A motion for summary judgment must contain a "brief statement of points and authorities relevant to the relief requested." D. Ak. L.R. 7.1(a)(2). The failure to include proper materials in support of a motion subjects the motion to summary ruling by the court *sua sponte*. D. Ak. L.R. 7.1(d). Therefore, plaintiffs' motion for summary judgment on these two constitutional issues is denied with leave to renew upon the proper filing of an applicable statement of points and authorities pertaining to them.

CONCLUSION

Based upon the foregoing: (1) defendants' motion for summary judgment on plaintiffs' *ex post facto* claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[32] (2) defendants' motion for summary

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[32] *See* pages 7 through 32, *infra*.

judgment on plaintiffs' Contracts Clause claim is granted, and plaintiff's cross-motion for summary judgement is denied;[33] (3) defendants' motion for summary judgment on plaintiffs' federal right to privacy claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[34] (4) defendants' motion for summary judgment on plaintiffs' Count III, pendant state law claims, is granted, and plaintiffs' cross-motion for summary judgment is denied;[35] (5) defendants' motion for summary judgment on plaintiffs' federal due process claims is granted as to plaintiffs' federal privacy interest claims, but denied as to plaintiffs' claims of federal due process based upon state privacy interests and state right to rehabilitation and reintegration, and plaintiffs' cross-motion for summary judgment is denied with leave to renew as to federal due process based upon state rights;[36] (6) plaintiffs' motion for summary judgment on their Fourteenth Amendment (equal protection) and Fourth Amendment (search and seizure) claims are denied with leave to renew.[37] If no such renewed motion(s) is filed on or before April 30, 1999, the court will deem plaintiffs to have abandoned these claims, and the clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice and vacating the preliminary injunction.

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[33] *See* pages 32 through 34, *infra*.

[34] *See* pages 34 through 42, *infra*.

[35] *See* pages 42 through 43, *infra*.

[36] *See* pages 43 through 48, *infra*.

[37] *See* pages 48 through 49, *infra*.

DATED at Anchorage, Alaska, this 31 day of March, 1999.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOHN DOE I, et al.,
Plaintiffs,
vs.
RONALD O. OTTE, Commissioner, et al.,
Defendants.

No. A94-0206-CV (HRH)

ORDER

(Filed August 12, 1999)

Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on their claim that the Alaska Sex Offender Registration Act ("ASORA") violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1] Defendants oppose and cross-move for summary judgment.[2] Oral argument has not been requested and is deemed unnecessary.

Facts

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act

[1] Clerk's Docket No. 119.

[2] Clerk's Docket No. 123.

("ASORA"), AS 12.63.010-12.63.100 and AS 18.65.087. Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the State of Alaska, and Bruce M. Bothelo, Attorney General for the state of Alaska. They are named in both their official and individual capacitites.

On March 31, 1999, the court granted defendants' motion for summary judgment[3] on all but two issues.[4] The plaintiffs' cross-motion[5] was denied, but they were granted leave to renew their federal due process claims that were based on alleged violations of their state-created constitutional rights to privacy and rehabilitation.[6] These claims are now the subject of the parties' pending cross-motions for summary judgment.

Discussion

Plaintiffs move for summary judgment asserting that ASORA violates the Fourteenth Amendment, Due Process Clause, of the United States Constitution because it invades important liberty interests granted by the Alaska

[3] Clerk's Docket No. 95.

[4] Clerk's Docket No. 118.

[5] Clerk's Docket No. 107.

[6] Clerk's Docket No. 118, at 48-49. Plaintiffs were also granted leave to renew two additional claims which they expressly abandon in this motion for summary judgment: whether ASORA violates the Does' Fourth Amendment right to be free from unreasonable search and seizure, and whether ASORA violates the Equal Protection Clause of the Fourteenth Amendment. Memorandum of Points and Authorities at 2, Clerk's Docket No. 119.

Constitution. The defendants cross-move for summary judgment. The parties acknowlede that resolution of these cross-motions would require a determination of whether ASORA violates certain provisions of the Alaska Constitution: the right to privacy granted by article I, section 22; the right to travel, the right to be let alone, and the right to be free from governmental control granted by article I, section 1; and the right to rehabilitation and reintegration guaranteed by article I, section 12.

At the time the parties' cross-motions were filed, the state courts of Alaska had not yet considered whether ASORA violated the Alaska Constitution and defendants urged this court to certify the issue to the Alaska Supreme Court. On July 23, 1999, the Alaska Court of Appeals issued its decision in *Patterson v. State*, ___ P.2d ___, No. A-6718, slip op. 1641 (Alaska App., July 23, 1999). In *Patterson*, the Alaska Court of Appeals held that ASORA does not violate the right to privacy under article I, section 22, of the Alaska Constitution.[7] *Id.* at 19-20. The court also held that ASORA did not violate the substantive due process clause because it does not infringe upon a sex offender's right to travel, obtain employment, and personal safety. *Id.* at 21.

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[7] Plaintiffs assert that Alaska law gives them a right to be left alone and to be free of government control. To the extent that there is a right to be left alone, it is a subset of the plaintiffs' Article I, Section 22, right to privacy under the Alaska Constitution. ASORA does not violate plaintiffs' right to be left alone. Article I, Section 1, does not contain a right to be free of government control.

While the court in *Patterson* did not address the right to rehabilitation or reintegration, the court noted that Patterson had not show [sic] any adverse impact on "any liberty interest." *Id.* at 21. Even assuming a liberty interest existed arising from the right to rehabilitation and reintegration, a statute violates substantive due process under Alaska law only if the statute has no reasonable relationship to a legitimate governmental purpose. *Id.* at 21-22. Since the registration and notification provisions according to *Patterson* are rationally related to the legitimate purpose of ensuring public safety, *id.*, there is no violation of substantive due process. Moreover, the right to rehabilitation and reintegration is coupled with other important constitutional considerations in article I, section 12, of the Alaska Constitution which provides:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.[8]

Thus in making provision for reformation of persons such as Doe I and II, the Alaska Legislature was bound to consider and make provision for the protection of the public as well as reformation of criminals. Plaintiffs have not shown that ASORA fails to strike a proper balance between reformation of sex offenders and protection of the public.

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[8] Article I, section 12, so reads today. When this suit was commenced, that section read:

> Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The Alaska Court of Appeals determined the ASORA does not violate the Alaska Constitution; therefore, there is no state granted liberty interest which can be protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Although the issues raised by Jane Doe were not before the Alaska Court of Appeals in *Patterson,* defendants are entitled to summary judgment on Jane Doe's claim that ASORA violates her right to privacy granted by the Alaska Constitution. If Doe I does not have a right to privacy afforded by the Alaska Constitution, Jane Doe's claim must fall [sic] also because she has made no showing that the provisions of ASORA were directed towards her, and under ASORA the defendants do not disclose any private information pertaining directly or uniquely to Jane Doe.

Conclusion

Based on the foregoing, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment in [sic] granted. The clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice.

DATED at Anchorage, Alaska, this 12 day of August, 1999.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845
D.C. No. CV-94-206-HRH

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Filed: September 6, 2001]

Before D. NELSON, REINHARDT, and THOMAS, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc and Judge D. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requesteded a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 99-35845
D.C. No. CV-94-206-HRH

JOHN DOE I, JANE DOE, AND JOHN DOE II,
PLAINTIFFS-APPELLANTS

v.

RONALD O. OTTE AND BRUCE M. BOTELHO,
DEFENDANTS-APPELLEES

[Filed: August 23, 2001]

Before D. NELSON, REINHARDT, and THOMAS, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thomas have voted to deny the petition for rehearing en banc and Judge D. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

ALASKA STATUTORY AND
REGULATORY PROVISIONS INVOLVED

STATUTES

1994 Alaska Session Laws ch. 41, § 1 provides:

> The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety.

1994 Alaska Session Laws ch. 41, § 12(a) provides:

> A sex offender with only one conviction for a sex offense who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under AS 12.63.010, added by sec. 4 of this Act. A sex offender who has been unconditionally discharged from a sex offense on or after July 1, 1984, but before the effective date of this Act, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994. A sex offender with two or more convictions for a sex offense before the effective date of this Act, regardless of whether the sex offender was unconditionally

released from the sex offense before, on, or after July 1, 1984, shall register under AS 12.63.010, added by sec. 4 of this Act, by July 1, 1994.

Alaska Statute 11.61.030 provides in part:

(a) A person commits the crime of misconduct involving weapons in the third degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory[.]

Alaska Statute 12.63.010 provides:

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's

initial registration, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901

Alaska Statute 12.63.020 provides:

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

(C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the registration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute 12.63.030 provides:

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not

know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

Alaska Statute 12.63.100 provides:

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(7) "unconditional discharge" has the meaning given in AS 12.55.185

Alaska Statute 18.65.087 provides:

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

(1) the sex offender or child kidnapper under AS 12.63;

(2) a post of the Alaska state troopers or a municipal police department under (a) of this section;

(3) a court judgment under AS 12.55.148;

(4) the Department of Corrections under AS 33.30.012 or 33.30.035;

(5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) Information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of

conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide to the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender or child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 – 40.25.220.

ADMINISTRATIVE REGULATIONS

13 Alaska Administrative Code § 09.025 provides:

(a) The department will approve or provide forms for an offender or a registration

agency to submit registration information to the department, including

(1) initial registration information required under AS 12.63.010(b)(1);

(2) a photograph required under AS 12.63.010(b)(2);

(3) a set of fingerprints required under AS 12.63.010(b)(2);

(4) notice of change of address required under AS 12.63.010(c);

(5) annual or quarterly verification of registration information required under AS 12.63.010(d);

(6) proof of unconditional discharge date as provided in AS 12.63.020(a)(2)(A) and (C) and 12.63.020(b);

(7) proof of compliance with a sex offender registration program in a jurisdiction outside this state as provided in AS 12.63.020(a)(2)(B);

(8) proof that an offender is not physically present in this state as provided in AS 18.65.087(a);

(9) a request to review or have corrected information maintained in the registry about the offender as provided in AS 18.65.087(d);

(10) a request to appeal an adverse decision under (9) of this subsection.

(b) The department's forms will contain a notice that offenders who move out of this state must comply with registration requirements of their new locations.

(c) When an offender appears in person to submit information to a registration agency, the registration agency shall collect the information from the offender on a form approved or provided by the department. The registration agency shall review the completed form in the presence of the offender. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency may not accept the form until the offender makes all necessary corrections.

(d) When an offender submits a registration form to a registration agency without appearing in person, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections.

(e) If registration information is accepted by a registration agency, an offender is considered to have submitted the information on the date that

(1) it is delivered in person to a registration agency;

(2) it is postmarked, if mailed;

(3) delivery is documented according to written instructions on a registration form, if a method of delivery other than in-person or mail is approved by the department.

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13 Alaska Administrative Code § 09.030 provides:

(a) Within 90 days after an offender registers under this chapter, the department will mail the offender a registration verification form that includes, based on the most recent information the department has obtained about the offender under AS 18.65.087(a),

(1) a statement of the duration of the offender's duty to register;

(2) an explanation of the annual or quarterly schedule by which the offender must submit registration verification information to the department for the duration of the offender's duty to register;

(3) the name of the offender's registration agency.

(b) If five or more years have passed since the date of an offender's registration photograph or there is another reason to believe the offender's appearance has changed significantly, a registration agency may instruct the offender in writing

(1) to appear in person at the registration agency to allow a photograph to be taken; or

(2) if authorized in writing by the department, to submit a new photograph without appearing in person.

UTAH STATUTORY PROVISION INVOLVED

Utah Code § 77-27-21.5 provides:

(1) As used in this section:

(a) "Department" means the Department of Corrections.

(b) "Notification" means a person's acquisition of information from the department about a sex offender, including his place of habitation, physical description, and other information as provided in Subsections (11) and (12).

(c) "Register" means to comply with the rules of the department made under this section.

(d) "Sex offender" means any person:

(i) convicted by this state of:

(A) Section 76-4-401, enticing a minor over the Internet;

(B) Section 76-5-301.1, kidnapping of a child;

(C) a felony violation of Section 76-5-401, unlawful sexual activity with a minor;

(D) Section 76-5-401.1, sexual abuse of a minor;

(E) Section 76-5-401.2, unlawful sexual conduct with a 16 or 17 year old;

(F) Section 76-5-402, rape;

(G) Section 76-5-402.1, rape of a child;

(H) Section 76-5-402.2, object rape;

(I) Section 76-5-402.3, object rape of a child;

(J) a felony violation of Section 76-5-403, forcible sodomy;

(K) Section 76-5-403.1, sodomy on a child;

(L) Section 76-5-404, forcible sexual abuse;

(M) Section 76-5-404.1, sexual abuse of a child or aggravated sexual abuse of a child;

(N) Section 76-5-405, aggravated sexual assault;

(O) Section 76-5a-3, sexual exploitation of a minor;

(P) Section 76-7-102, incest;

(Q) Section 76-9-702.5, lewdness involving a child;

(R) Section 76-10-1306, aggravated exploitation of prostitution; or

(S) attempting, soliciting, or conspiring to commit any offense listed in Subsection (1)(d)(i)(A), (B), (C), (E) through (P), or (R);

(ii) convicted by any other state or the United States government of an offense which if committed in this state would be punishable as one or more of the offenses listed in Subsection (1)(d)(i) and who is:

(A) a Utah resident; or

(B) not a Utah resident, but who is in the state for a period exceeding 14 consecutive days, or for an aggregate period exceeding 30 days, during any calendar year; or

(iii) who is found not guilty by reason of insanity of one or more offenses listed in Subsection (1)(d)(i).

(2) The department, to assist in investigating sex-related crimes and in apprehending offenders, shall:

(a) develop and operate a system to collect, analyze, maintain, and disseminate information on sex offenders and sex offenses; and

(b) make information collected and developed under this section available to the public.

(3) Any law enforcement agency shall, in the manner prescribed by the department, inform the department of:

(a) the receipt of a report or complaint of an offense listed in Subsection (1)(d), within three working days; and

(b) the arrest of a person suspected of any of the offenses listed in Subsection (1)(d), within five working days.

(4) Upon convicting a person of any of the offenses listed in Subsection (1)(d), the convicting court shall within three working days forward a copy of the judgment and sentence to the department.

(5) A sex offender in the custody of the department shall be registered by agents of the department upon:

(a) being placed on probation;

(b) commitment to a secure correctional facility operated by or under contract to the department;

(c) release from confinement to parole status, termination or expiration of sentence, or escape;

(d) entrance to and release from any community-based residential program operated by or under contract to the department; or

(e) termination of probation or parole.

(6) A sex offender not in the custody of the department and who is confined in a correctional facility not operated by or under contract to the department shall be registered with the department by the sheriff of the county in which the offender is confined upon:

(a) commitment to the correctional facility; and

(b) release from confinement.

(7) A sex offender committed to a state mental hospital shall be registered with the department by the hospital upon admission and upon discharge.

(8) A sex offender convicted by any other state or by the United States government is required to register under Subsection (1)(d)(ii) and shall register with the department within ten days after entering the state.

(9)(a) Except as provided in Subsections (9)(b) and (c), a sex offender shall, for the duration of the sentence and for ten years after termination of sentence, register annually and again within ten days of every change of his place of habitation.

(b)(i) A sex offender convicted of any of the offenses listed in Subsection (9)(b)(ii) shall, for the offender's lifetime, register annually and again within ten days of every change of the offender's place of habitation. This registration

requirement is not subject to exemptions and may not be terminated or altered during the offender's lifetime.

(ii) Offenses referred to in Subsection (9)(b)(i) are:

(A) any offense listed in Subsection (1)(d) if the offender has previously been convicted of an offense listed in Subsection (1)(d);

(B) Section 76-5-402.1, rape of a child;

(C) Section 76-5-402.3, object rape of a child;

(D) Section 76-5-403, forcible sodomy;

(E) Section 76-5-403.1, sodomy on a child; and

(F) Section 76-5-405, aggravated sexual assault.

(c) Notwithstanding Subsections (9)(a) and (b), a sex offender who is confined in a secure facility or in a state mental hospital is not required to register annually.

(10) An agency in the state that registers a sex offender on probation, a sex offender who has been released from confinement to parole status or termination, or a sex offender whose sentence has expired shall inform the offender of the duty to comply with the continuing registration requirements of this section during the period of registration required in Subsection (9), including:

(a) notification to the state agencies in the states where the registrant presently resides and plans to reside when moving across state lines;

(b) verification of address at least every 60 days pursuant to a parole agreement for lifetime parolees; and

(c) notification to the out-of-state agency where the offender is living, whether or not the offender is a resident of that state.

(11) A sex offender shall provide the department with the following information:

(a) all names or aliases the sex offender is or has been known by;

(b) the sex offender's name and residential address;

(c) a physical description, including the sex offender's age, height, weight, eye and hair color;

(d) the type of vehicle or vehicles the sex offender drives; and

(e) a current photograph of the sex offender.

(12) The department shall provide the following additional information when available:

(a) the crimes the sex offender was convicted of; and

(b) a description of the sex offender's primary and secondary targets.

(13)(a) A sex offender who knowingly fails to register under this section is guilty of a class A misdemeanor and shall be sentenced to serve a term of incarceration for not fewer than 90 days and also at least one year of probation.

(b) Neither the court nor the Board of Pardons and Parole may release a person who violates this section from serving a term of at least 90 days and of completing probation of at least one year. This Subsection (13)(b) supersedes any other provision of the law contrary to this section.

(14) Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act, information in Subsections (11) and (12) collected and released under this section is public information.

(15)(a) If a sex offender is to be temporarily sent outside a secure facility in which he is confined on any assignment, including, without limitation, firefighting or disaster control, the official who has custody of the offender shall, within a reasonable time prior to removal from the secure facility, notify the local law enforcement agencies where the assignment is to be filled.

(b) This Subsection (15) does not apply to any person temporarily released under guard from the institution in which he is confined.

(16) Notwithstanding Sections 77-18-9 through 77-18-14 regarding expungement, a person convicted of any offense listed in Subsection (1)(d) is not relieved from the responsibility to register as required under this section.

(17) Notwithstanding Section 42-1-1, a sex offender:

(a) may not change his name:

(i) while under the jurisdiction of the department; and

(ii) until the registration requirements of this statute have expired; or

(b) may not change his name at any time, if registration is under Subsection (9)(b).

(18) The department may make rules necessary to implement this section, including:

(a) the method for dissemination of the information; and

(b) instructions to the public regarding the use of the information.

(19) Any information regarding the identity or location of a victim shall be redacted by the department from information provided under Subsections (11) and (12).

(20) Nothing in this section shall be construed to create or impose any duty on any person to request or obtain information regarding any sex offender from the department.

(21) If the department chooses to post registry information on the Internet, the website shall contain a disclaimer informing the public of the following:

(a) the information contained on the site is obtained from sex offenders and the department does not guarantee its accuracy;

(b) members of the public are not allowed to publicize the information or use it to harass or threaten sex offenders or members of their families; and

(c) harassment, stalking, or threats against sex offenders or their families are prohibited and doing so may violate Utah criminal laws.

(22) The department shall construct the website so that users, before accessing registry information, must indicate that they have read the disclaimer, understand it, and agree to comply with its terms.

(23) The department, its personnel, and any individual or entity acting at the request or upon the direction of the department are immune from civil liability for damages for good faith compliance with this section and will be presumed to have acted in good faith by reporting information.

(24) The department shall redact information that, if disclosed, could reasonably identify a victim.

Supreme Court, U.S.
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In The

Supreme Court of the United States

RONALD L. OTTE and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents ["The Does"] respectfully request that this Court deny the petition for writ of certiorari because petitioners have failed to show compelling reasons, meeting the criteria listed in this Court's Rule 10, that justifies the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE

A. Introduction.

Article I, Section 12, of the Alaska Constitution accords the Does the right to rehabilitate and reintegrate with all the attendant rights possessed by any other member of the public. *Abraham v. Alaska*, 585 P.2d 526, 531 (Alaska 1978). This right is protected by the Due Process Clause of the 14th Amendment. *Ferguson v. State, Dept. of Corrections*, 816 P.2d 134, 139 (Alaska 1991).

In 1985, Doe I entered a plea of nolo contendere to a charge of intra-family sexual abuse. *Doe v. Otte*, 259 F.3d 979, 983 (9th Cir. 2001); *Pet. App. at 4a.* He was released from prison in 1990. *Id.* After his release, a state court determined that he was successfully rehabilitated and granted him custody of his minor daughter. *Id.* The state court's determination was based, in part, on psychiatric evaluations concluding that Doe I was Aa very low risk for re-offending@ and is Anot a pedophile.@ *Id.* He remarried, and is a productive member of the community. *Id.*

Doe II was convicted via a nolo contendere plea in 1984. *Doe*, 259 F.3d at 983, *Pet. App. at 4a.* He was convicted of sexual abuse of a 14 year old child and was released from prison in 1990. *Id.* After his release, he

successfully completed a two-year program for treatment of sex offenders. *Id.*

Notwithstanding the Does right to reintegrate and regain the respect, rather than the fear and loathing of their fellow citizens[1], and notwithstanding the fact that the Does were rehabilitated and reintegrated, the Alaska legislature concluded that certain reintegrated prior-offenders were dangerous and should be supervised for life. Petitioners admit, the past conviction operates as conclusive proof of future dangerousness and the need for a lifetime registration requirement. *Pet. at 13.* Petitioners contend that imposition of this lifetime registration and public notification requirement, based only on a past conviction is regulatory. *Pet. App. at 79a.* Petitioners, however, have never been able to identify exactly what activity they are regulating. *Resp. App. at 7a.*

The Does argue that the Ninth Circuit court of appeals properly applied, well established law and concluded the ASORA was excessive in light of its purported regulatory purpose, and that retroactive application of the Alaska Sex Offender Registration Act ["ASORA"] violates the Ex Post Facto Clause. *Doe*, 259 F.3d at 993-994, *Pet. App. at 28a - 29a.* No stay of the mandate was requested, and petitioners now seek a writ of certiorari from this Court. In doing so, they have completely failed to demonstrate the existence of any compelling reason why a writ should issue.

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1 . *Abraham v. Alaska*, 585 P.2d at 531

B. The ASORA.

The ASORA was first passed by the Alaska legislature in 1994. § *1 ch. 41 SLA 1994*; Ak. *Stat. 12.63.010 (1994).* This version required previously convicted offenders to register with, and periodically report to the authorities. It also required registrants to immediately report any change in residence, and to update their registration information once per year. *Ak. Stat. 12.63.010(c) & (d) (1994).* Application of the ASORA§s provisions are triggered solely by the prior conviction. *Ak. Stat. 12.63.100 (1994).*

Alaska created a central registry of sex offenders. *Ak. Stat. 18.65.087 (1994).* All information obtained during the registration process is kept in this central registry, and the offender's name, current address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence was available on demand to the general public.[2] *Ak. Stat. 18.65.087(b) (1994)* .

The legislature placed these new disabilities in Title 12 of the Alaska Statutes, which contains Alaska's criminal procedure and sentencing provisions. Moreover, it amended Rules 32 and 11 of the Alaska Rules of Criminal Procedure. Criminal Rule 11 was

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2 . Under the 1994 version, a specific demand for information was required, but under the 1998 amendments, Alaska published all of the information on the Internet. *See*, Internet Address: *http://www.dps.state.ak.us/Sorcr.* This site is maintained by the State of Alaska, Department of Public Safety.

amended to require the duty to register be a "written" part of any plea agreement involving a sexual offense. Criminal Rule 32(b) was amended by requiring the duty to register to be a "written" part of any sentence imposed for a sex offense. The legislature intended that the ASORA apply retroactively to offenses committed prior to the effective date. § *12(a) ch. 41 SLA 1994.*

In 1998, the legislature made sweeping changes to the ASORA and related criminal statutes. In amending the ASORA, the legislature created a new offense for failure to register, and increased the classification of that offense from a misdemeanor to a felony. *Ak. Stat. 11.56.835 (1998).* The legislature also added those persons convicted of child kidnaping as persons who would be required to register under the ASORA. *Ak. Stat. 12.63.010(a) (1998).*

The 1998 amendments increased the amount of information to be collected and disclosed by an offender. *Ak. Stat. 12.63.010 (1998).* It also increased the length of the reporting requirement -- for some offenders, including the Does, from 15 years to life. *Ak. Stat. 12.63.010(d)(2) (1998).* Additionally, the amendments increased the frequency with which an offender must re-register. For persons required to register for life, re-registration must occur four times per year. *Id.*[3] During

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[3] . Under the 1994 version of the ASORA, the Does were required to register for a period of 15 years, and re-
Continued .....

each quarterly re-registration, the same information must be collected and provided, even if there are no changes in the information. *Id.*

C. Proceedings Below.

In 1994, the Does filed a complaint seeking injunctive relief and a declaratory judgment pursuant to *28 U.S.C. § 1343(3), 42 U.S.C. § 1983* and *28 U.S.C. § 2201. Pet. App. A-74a.* The district court granted a preliminary injunction, which required the Does' registration but precluded release of registration information. *Rowe v. Burton*, 884 F.Supp. 1372, 1385 (D. Alaska 1994). The Does also sought leave to proceed under pseudonyms, which leave was denied. *Rowe*, 884 F.Supp. at 1388. The Does successfully appealed that part of the district court's decision denying leave to proceed under pseudonym. *Pet. App. at 74a, fn. 15.*

In July 1998, petitioners filed a motion for summary judgment. *Pet. App. at 75a-76a.* The Does opposed and filed a cross-motion. *Id.* Petitioners made no attempt to support any statement of fact with evidence.[4]

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register once per year. Under the 1998 version, the Does are required to register for life, and re-register four times per year.

[4] . Petitioners make numerous representations of fact in their petition to this Court, which are unsupported by any evidence, either in the record before the district or appellate court, or in their appendix. *E.g., Pet. at 2-3.* Apparently, petitioners believe they need not support facts with evidence, and the
Continued .....

The Does submitted several affidavits supporting the excessive and punitive nature of the ASORA. *Pet. App. at 14a-15a. 107a. Id.* at *107a fn. 25.* One affidavit was from a former Alaska field service probation officer who compared the ASORA to other forms of criminal supervision under Alaska Law, e.g., probation, mandatory parole, and discretionary parole, and who concluded that the ASORA was nothing more than a disguised form of supervision. She also provided uncontested proof that prior offenders were losing employment and housing opportunities because the State published their names, addresses and places of employment on the World Wide Web. The State never contested any of the Does' evidence. In fact, the Ninth Circuit recognized that the Doe's evidence was Auncontradicted.@ *Doe*, 259 F.3d at 994, *Pet. App. at 28a.*

In 1999, the district court granted petitioners' motion for summary judgment. *Pet. App. at 69a, 118a.* In doing so, the district court considered the 1998 amendments, enacted during the course of the litigation. *Pet. App. at 70a, fn. 3.* The Does appealed that decision, and the Ninth Circuit reversed. *Doe*, 259 F.3d at 993-

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Court should believe every word they say; at least, until they later say they were mistaken, in which case they maintain if the Court were to believe them it would constitute reversible error. *Pet., at 15.*

995; *Pet. App. at 1a.*. Petitioners now seek a writ of certiorari.

D. The Ninth Circuit's Decision.

In considering whether the ASORA was punishment for purposes of Ex Post Facto analysis, the Ninth Circuit applied the Aintent-effects test.@ *Doe*, 259 F.3d at 984-985; *Pet. App. at 8a -9a.* In doing so, the panel considered the ASORA as a whole -- it did not separate the registration and public notification provisions. *Id.* It did so because the ASORA was enacted as a single piece of legislation, the Alaska Court of Appeals had previously applied the test to the ASORA as a whole, and the parties agreed that a unitary analysis was appropriate. *Doe*, at 985; *Pet. App. at 9a.*

In applying the "intent-effects test", the Ninth Circuit first examined the structure and design of the ASORA and concluded that the ASORA had a non-punitive intent. *Doe*, 259 F.3d at 986; *Pet. App. at 10a - 12a.*. In considering the ASORA's effect, the panel applied the seven factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Doe*, 259 F.3d at 986; *Pet. App. at 12a - 27a.* The panel concluded that the Does had shown by the "clearest proof" that notwithstanding the legislature's non-punitive intent, the ASORA should be classified as punitive for Ex Post Facto purposes. *Doe*, at 993-994; *Pet. App. at 28a.* The panel held that four of the seven *Kennedy* factors compelled this result. *Id.* Although there were other issues raised

in the appeal, the panel held it did not have to consider other arguments because the Ex Post Facto Clause barred application of the ASORA to Doe I and Doe II. *Doe*, 259 F.3d at 995; *Pet. App. at 31a.* Thus, Jane Doe received all of the relief she sought. *Id.*

REASONS FOR DENYING THE PETITION

I. Summary of argument.

Rule 14(1)(h) of this Court's rules of procedure requires a direct and concise argument discussing the factors listed in this Court's Rule 10, which a petitioner contends counsel in favor of granting the petition. Petitioners fail to recognize the existence of Rule 10, and they have failed to provide a direct and concise discussion of reasons warranting allowance of the writ. *See, Pet., generally.*

Petitioners' failure to consider this Court's Rule 10 and the factors listed therein resulted in a petition that is devoid of merit. *Pet. generally.* This is so, because the Ninth Circuit's decision does not erode the State's ability to protect its citizens. *Pet. at 6.* Rather, it requires petitioners to protect the rights of reintegrated, prior offenders and their families, who are also productive citizens of the State. Moreover, petitioners' complaint about an alleged misstatement of Alaska law likewise lacks merit. *Pet. at 11.* This is because, even if it were true, the error would not change the result and harmless error does not represent important and compelling reasons justifying an exercise of this Court's

discretionary jurisdiction. *Sup. Ct. R. 10.* Finally, petitioners' contention that a conflict exists between the Tenth and Ninth Circuits is also without merit. *Pet. at 9.* This is so because no conflict exists. It is also true because petitioners have failed to show that two circuit courts have applied or interpreted the same body of federal law differently. *Pet. generally.* At most, all petitioners have done is allege that either the Ninth or the Tenth Circuit misapplied a properly stated rule of law, but that is not grounds for issuance of a writ. *Sup. Ct. R. 10.*

II. The Petitioners' Lament Over An Admission Made During Oral Argument.

Petitioners' basic complaint is that the Ninth Circuit adopted a "verifiably false interpretation of Alaska's law" when it relied on counsel's statements at oral argument. *Pet. at 11, 15..* Notably, petitioners made this same complaint in seeking rehearing, and in suggesting rehearing *en banc*, both of which were denied.[5] *Pet. App. at 123a..* There are two reasons why petitioners' complaint about this alleged misstatement fails to meet the compelling reasons test envisioned by this Court's Rule 10.

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[5] . Although petitioners have previously complained about this alleged misstatement they have never provided a transcript of that statement so it could be viewed within the context in which it was made. Respondents provide that transcript. *Respondents' Appendix. 1a.*.

First, it was not a misstatement of Alaska law. Petitioners, through counsel, told the Ninth Circuit that under current law the Does could be required to report four times per year to the local police station. *Resp. App. at 4a.* Under current law, that could in fact be the case. *Ak. Stat. 12.63.010(d)(2) (1998).* The particular provision says that a registrant will register four times per year for the rest of his/her life, "in the manner required by the department." *Id.* Hence, the department could require in person reporting if it chose to do so. Indeed, in exercising the unfettered discretion vested by the statute, petitioners could even decide to have a uniformed officer contact the registrant at his job and require the form be sworn to in front of the officer. Or, the same could be true for the registrant's home. The point being, the statute does not limit the procedures to be employed, and it provides no safeguards to protect registrants.

In an attempt to show that counsel's admission was a misstatement of the law, petitioners ignore the statute and cite to a regulation. *Pet. at 11, citing 13 Alaska Admin. Code §§ 09.025, 09.030.* The fatal flaw in this argument is that in applying the "intent-effects" test, the Ninth Circuit was required to, and did in fact, examine the ASORA on its face. *U.S. v. Ward*, 448 U.S. 240, 248 (1980). It was not required to look to the

manner in which petitioners applied the ASORA.[6] *Seling v. Young*, 531 U.S. 250, 263 (2001). In properly applying decisions from this Court, and in examining the ASORA on its face, the particular provision allows unfettered discretion. It clearly allows an interpretation that could require in person reporting four times per year. *Ak. Stat. 12.63.010(d)(2) (1998).* That being the case, the statement was not a misstatement, and the Ninth Circuit did not adopt a "verifiably false interpretation of Alaska's law". *Pet. at 11, 15..*

Second, petitioners' argument has no merit because even if counsel made a misstatement of Alaska law, it was a harmless error - it would not change the result reached by the Ninth Circuit. *Pet. App. 1a.* This is so because in concluding that retroactive application of the ASORA violated the Ex Post Facto Clause, the court of appeals considered both the registration and public notification provisions as a whole, not just the registration aspect. *Doe*, 259 F.3d at 985, *Pet. App. at 9a.*

If, as petitioners contend, the in person reporting requirement was a misstatement of Alaska law, that

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6 . In fact, even the Alaska Supreme Court has held that it is improper to consider an administrative interpretation adopted during the course of litigation when interpreting a statute. *See, Totemoff v. State*, 905 P.2d 954, 967 (Alaska 1995). Lower federal court's have similarly so held. *See, Lewis v. Grinker*, 965 F.2d 1206, 1220 (2nd Cir. 1992), *citing, Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

small section of the ASORA relates only to registration - it has nothing to do with the excessive nature of the other registration provisions or the public notification requirements. *Doe*, 259 F.3d at 993, *Pet. App. at 28a - 29a.* That being true, any alleged error in relying on petitioners' concession would not change the fact that many other provisions, including the public notification provisions and the lack of an escape mechanism, also make the ASORA excessive in light of its purported regulatory purpose. *Id.* Moreover, it does not change the fact that one of the many reasons supporting the finding that the ASORA was excessive in relation to its purported regulatory purpose was that it lacked any procedures for making individual risk assessments before its onerous provisions were applied to reintegrated Alaska citizens. *Doe*, 259 F.3d at 992; *Pet. App. at 25a - 26a.*

Further, the Ninth Circuit's decision is not limited to only those offenders who are required to report quarterly, for life. The Ninth Circuit held that the ASORA may not be applied retroactively to any registrants, including those who need only report annually. Thus, the petitioners are simply wrong to suggest the entire opinion was based on the adoption of a verifiably false interpretation of Alaska law.

Moreover, as the court of appeals correctly held, nearly every sex offender registration and notification law that has been upheld tailored the provisions of the statute to the actual risk posed by the individual

offender. *Id.* As petitioners admit, Alaska does not seek to determine individual risk. *Resp. App. at 9a.* Rather Alaska requires the reintegrated, rehabilitated offender to collect all of the necessary information, provide it to petitioners, who then posts that information on the World Wide Web. By doing so, petitioners are telling everyone that the reintegrated offender is dangerous. Although petitioners contend it is impossible to predict future dangerousness[7], by labeling a reintegrated, rehabilitated individual a "sex offender" and by publishing his picture and private information in a public database, petitioners have told the public the individual is dangerous. As petitioners admit, they have made this prediction without any proof of present day dangerousness. *Resp. App. at 9a.* This lack of individual determination of risk was a major factor weighing in favor of finding the ASORA excessive; hence, even if there was a misstatement of Alaska law, it does not rise to the level of reversible error -- the error was harmless. Harmless error does not constitute sufficiently compelling reasons to support a petition for writ of certiorari and petitioners' argument to the contrary has no merit.

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7 . *See, Resp. App. at 9a.*

III. The Ninth Circuit's decision does not erode Alaska's ability to protect the public from sex offenders.

Lacking a cogent argument meeting the criteria of this Court's Rule 10, petitioners choose to rely on a confusing policy argument, which, in essence, seeks an exception to the prohibition on passage of Ex Post Facto Laws. *Pet. at 6 - 8.* Indeed, petitioners do not argue that the Ninth Circuit applied the wrong test, or that it misinterpreted decisions from this Court. *Id.* Rather petitioners argue that in protecting the rights of the Does, the Ninth Circuit has significantly restricted the means by which states in the Ninth Circuit can enforce their laws. *Pet. at 8.* This argument has no merit whatsoever because it is not the Ninth Circuit that prohibits retroactive application of punitive legislation; rather, it is the Ex Post Facto Clause that does so.

It is true, that by holding retroactive application of the ASORA unconstitutional, the Ninth Circuit has restricted Alaska's ability to retroactively apply certain laws. *Pet. at 8.* However, requiring Alaska to follow the Constitution of the United States and prohibiting Alaska from violating the Ex Post Facto Clause is not unreasonable; it is mandated by over 200 years of history. *See E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810), *Calder v. Bull*, 3 U.S. (3 Dall) 386, 391 (1798).

It is not true that the Ninth Circuit has restricted the means by which all states within the Circuit may enforce their laws. *Pet. at 8.* In fact, in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub non., Stearns v. Gregoire*, 523 U.S. 1007 (1998), the Ninth Circuit rejected an Ex Post Facto challenge to the State of Washington's SORA. Considering *Russell and Doe*, all the Ninth Circuit has done is provide a guideline for the states in the Ninth Circuit to follow when enacting registration and notification statutes. If, as in *Russell*, the statutes are narrowly tailored and minimally intrusive, they will be upheld. If, however, as in *Doe*, the statutes are not narrowly tailored to the purported regulatory purpose, they will not withstand constitutional challenge. This is consistent with decisions from this Court. *See, NAACP v. Alabama*, 377 U.S. 288, 303-304 (1964).

In *NAACP*, this Court held that where exercise of the state's regulatory power infringes on protected freedoms; the means employed must be narrowly tailored. *Id.* Clearly, all the Ninth Circuit has done is hold petitioners to established standards set down by this Court, and held that Alaska's law could not be upheld because it was excessive in relation to its purported regulatory purpose. *Doe*, 259 F.3d at 991-992; Pet. App. at 24a - 27a.

Petitioners admitted before the Ninth Circuit that the provisions of the ASORA were much more onerous

than the provisions of the Washington SORA. *Resp. App. at 3a - 4a.* When asked whether the panel was correct in determining that the Washington SORA was much less broad, and that the ASORA was much more excessive, petitioners responded by telling the panel they were correct in that analysis. *Resp. App. at 4a.* Moreover, petitioners told the panel that one of the significant differences between the Washington SORA and the ASORA was that Alaska makes no attempt to predict the risk posed by the individual offender, it just treats all persons previously convicted as presently posing a danger. *Resp. App. at 5a.* Here, petitioners argue that the Ninth Circuit's decision is going to restrict the manner in which states may enforce their laws, but that is simply not true. It is not true because, as petitioners admitted before the Ninth Circuit, no other state has a law that closely resembles the ASORA.. *Resp. App. at 7a.*

IV. The Ninth Circuit's decision is not in conflict with a decision from the Tenth Circuit.

Petitioners erroneously contend that the Ninth Circuit's decision conflicts with the Tenth Circuit's decision in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). *Pet. at 9 - 11.* This contention is unconvincing because the Ninth Circuit properly applied the Aintent-effects@ test to Alaska law, while the Tenth Circuit applied the same test to Utah law. Application of the same body of federal law to a different set of facts or

different state statutes does not constitute the type of conflict envisioned by this Court's Rule 10.

In seeking to determine whether the particular Act in question was Aso punitive either in purpose or effect@ that it should be considered to constitute punishment, both the Tenth and the Ninth Circuit applied the seven factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169. *Doe*, 259 F.3d at 984; *Pet. App. at 8a., Femedeer*, 227 F.3d at 1248-1249. Each Court was applying this test to a different set of facts and a different appellate record. Petitioners make no assertion that the Ninth Circuit misapplied these factors, or that the Tenth Circuit relied on some properly interpreted body of federal law that the Ninth Circuit failed to consider. Rather, petitioners merely argue that in applying the same body of federal law to a different set of facts, each Court reached a different conclusion. That should certainly not be surprising, but it remains that proper application of the same body of federal law by two different appellate courts to two different sets of facts or to two different state statutes does not constitute a conflict between the Circuits. *See E.g., Weisgram v. Marley Co.*, 528 U.S. 440, 446 (2000), [conflict where federal rule was interpreted different by two or more Circuit Courts]; *Drye v. U.S.*, 528 U.S. 49, 54 (1999), [conflict where prior decisions from this Court have been interpreted differently by the Circuits]; *and see, Curry v. Baker* 479 U.S. 1301, 1302 (1986), [no conflict where

cases present unique facts closely tied to a specific State law].

Clearly, petitioners§ request for relief does not meet this Court's Rule 10 test for conflict between the Circuits. As envisioned by the Rule 10, issuance of the writ is warranted if a court of appeals has rendered a decision on federal law that is in conflict with the decision of another United States court of appeals on the same body of federal law. There is clearly no conflict between courts in this case, because both the Ninth and Tenth circuits properly interpreted and applied the same body of federal law.

Petitioners are also wrong because the Ninth Circuit specifically distinguished this case from *Femedeer*. *Doe*, 259 F.3d at 992, fn. 11. In so doing, the Ninth Circuit concluded that *Femedeer* was distinguishable because "[u]nlike the Alaska statute ... the Utah database does not include employer names and addresses, and thus does not place the sex offenders' current employment in direct jeopardy." *Id.* Indeed, in upholding the Utah statute, the Tenth Circuit concluded that "notification does not by itself prohibit sex offenders from pursuing any vocation or avocation" because the name of the employer and place of employment were not listed on the database. *Femedeer*, 227 F.3d at 1247, 1250.

The Ninth Circuit had evidence before it that constituted the "clearest proof" that employment was not

only put in jeopardy, but opportunities were lost due to the public notification in Alaska. *Doe*, 259 F.3d at 987-988. No such evidence could have been before the Tenth Circuit because employer information was not included on the database. *Femedeer*, 227 F.3d at 1247, 1250.

The Ninth Circuit further distinguished Alaska's statutory scheme from Utah's by finding that Alaska's only applies to those found guilty of a sex offense, while Utah's applied to persons civilly committed or found not guilty by reason of insanity. *Doe*, at 991; *Femedeer*, 227 F.3d at 1251-1252. This finding was directly supported by petitioners admission that Alaska's statutory scheme was unique, and that it was excessive in light of other state registration and public notification laws. *Pet. App. at 4a, 7a.*

There is no conflict between the Tenth and Ninth Circuits, and certainly not the type of conflict envisioned by this Court's Rule 10. That being the case, there are no grounds for issuance of the requested writ.

V. The Ninth Circuit did not err by disregarding the Legislature's remedial intent.

Petitioners complain that the Ninth Circuit was simply wrong in concluding that the ASORA was different from, and more punitive than registration and public notification laws enacted by other states. *Pet. at '2-16.* At the risk of being redundant, respondents are again compelled to point out that petitioners' argument has no merit and the reasons asserted therein do not fit

within the well-defined tests enumerated in this Court's Rule 10.

First, the Alaska legislature's decision to rely solely on the past conviction as evidence of future dangerousness is contrary to decisions from this Court. *Pet. at 13.* Although cited by petitioners in briefing before the Ninth Circuit, petitioners ignore this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 360-362, (1997), wherein this Court upheld Kansas civil commitment provisions, in part, because it did not rely exclusively on the past conviction as evidence of future dangerousness. *Id.* The rationale of *Hendricks* is that if the past conviction is used as conclusive proof of future dangerousness, without any procedural protections, the particular state provisions will not pass constitutional muster. *Id.* Hence, petitioners are simply wrong to conclude that Alaska may do what other states may not do. The federal constitution applies to all states, and Alaska is not exempt for its requirements.

Petitioners are also wrong to rely on cases such as *Hawker v. New York*, 170 U.S. 189 (1898) to support the proposition that the prior conviction can be used as conclusive proof of future dangerousness. *Pet. at 13.* This is so, because the central premise in *Hawker* and its progeny is that the government may regulate a specific activity and bar felons from participating if relevant past conduct shows an unfitness to participate. Here, petitioners are not regulating a specific activity; rather,

petitioners are compelling action on the part of a reintegrated, rehabilitated prior offender by requiring him to gather and collate information and neatly package that information so petitioners can disseminate it to the public with a warning that the individual presently presents a danger. Nothing in *Hawker* could fairly be read to authorize such punitive measures.

Additionally, *Hawker* and its progeny are clearly distinguishable because laws, such as those before the Court in *Hawker*, have no effect on the individual unless the individual seeks to participate in the activity being regulated. If, the individual does not seek to participate, he will never feel the effect of the law. Here, the ASORA goes directly to the individual and compels action, e.g., gathering and collating otherwise private information, without any activity participation required to trigger its effects and application. *See, Pet. at 15.* Hence, petitioners' reliance on *Hawker*, and on laws that regulate business, etc., is misplaced. *Id.*

Moreover, petitioners' argument ignores this Court's reasoning in *Flemming v. Nestor*, 363 U.S. 603, 612-616 (1960) wherein this Court held that focusing on an activity from which an offender should be barred because of relevant past conduct is appropriate; but focusing on the person or persons to be barred presumes punitive intent. *Id.* Here, the ASORA does not bar participation in any activity that the state has the power to regulate; rather, it is aimed at the class of persons to

whom the ASORA applies. *Id., Resp. App. at 8a - 9a.* The danger posed by laws which seek to regulate the person, rather than an activity from which the person should be barred, was best expressed in a recent decision from the Massachusetts Supreme Court. In *Doe v. Attorney General*, 715 N.E.2d 37, 43 (Mass. 1999), the Massachusetts Court said:

> Registration--the requirement that a citizen regularly report to the police for an extended term of years--engages serious liberty interests, and presents an importantly distinct kind of constitutional danger. It is a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Id., [citations omitted]. Clearly, petitioners' reliance on *Hawker* and its progeny is woefully misplaced because the ASORA does not regulate an activity from which the Does should be barred because of relevant past conduct.

Next, petitioners argue that use of the Internet to allow the public access to public information does not

make Alaska's law punitive. *Pet. at 13.* But, Alaska does much more than make information available. *Resp. App. at 5a.* Alaska forces its reintegrated citizens to compile the information and provide information that is otherwise private, e.g., place of employment, name of employer, home address, vehicle description, etc. *Id.* Publication of this information makes it nearly impossible for fully reintegrated citizens to obtain and maintain employment. *Doe*, 259 F.3d at 987. Petitioners' argument ignores all of these realities and oversimplifies their case regarding Internet publication. Moreover, it also ignores this Court's characterization of the Internet as a technological advancement that allows a person to become a town crier with a voice that resonates farther than it could from any historical soapbox. Reno v. A.C.L.U., 521 U.S. 844, 869 (1997).

Petitioners' argument regarding use of the Internet is deceptive because it suggests that all they do is make the otherwise available information more readily available. *Pet. at 13-14.* But, if that is really the case then the petition for writ of certiorari is an exercise in futility because the ASORA is completely unnecessary. Why have a law that compels previously convicted and now reintegrated offenders to compile information and report that information four times per year, if the information is already available? Doesn't the simple fact that the ASORA compels the doing of an unnecessary act compel the conclusion that it is excessive in relation to

its purported regulatory purpose? Wouldn't that fact alone indicate the ASORA is nothing more than a penal measure dressed in civil clothing?

The fact is, the ASORA compels compilation by certain of its reintegrated citizens because petitioners do not have ready access and when petitioners publish that information they are telling the public these individuals are dangerous. *Pet. at 13-14.* Moreover, contrary to their suggestion, that they are merely making information available *[Id.]*, they tell the public to either use that information or be subject to criminal penalties. As an example, failure to use the information could result in a charge of endangering the welfare of a child *Ak. Stat. 11.51.100(a)(2)(A)*, or a finding of a child in need of aid *Ak. Stat. 47.10.011(7), or an* allegation of misrepresentation in a real property transfer. *Ak. Stat. 34.70.050.* Although they tell the public to use the information, they have not enacted any penalties for misuse of that information.

Unquestionably, petitioners suggestion that publication of the information on the Internet merely makes otherwise available information, more readily available is simply not true. More importantly, the argument simply does not and could not meet the criteria listed in this Court's Rule 10. Consequently, petitioners have failed to show why that argument justifies the grant of a writ of certiorari.

CONCLUSION

The petitioners having failed to identify any compelling reason to justify this Court's exercise of its discretionary jurisdiction, the request for a writ of certiorari must be denied.

RESPECTFULLY SUBMITTED;

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No. 01-729

In The

Supreme Court of the United States

RONALD L. OTTE and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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DOCKET NUMBER 99-35845

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, JANE DOE, AND
JOHN DOE II,

Appellants-plaintiffs

vs.

RONALD L. OTTE, COMMISSIONER
ALASKA DEPARTMENT OF PUBLIC SAFETY
AND BRUCE BOTELHO,
ALASKA ATTORNEY GENERAL

VOLUME I of I

TRANSCRIPT OF ORAL ARGUMENT (EXCERPT)
August 1, 2000

BEFORE, NELSON, REINHARDT AND THOMAS

Circuit Judges

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PROCEEDINGS

MR. ROSENSTEIN: May it please the court, my name is Ken Rosenstein and I'm representing the State of Alaska in this case. In Russell v. Gregoire this court upheld Washington's sex offender registration statute against Challenges that were -- that are similar to those asserted in this case.

CIRCUIT JUDGE REINHARDT: Well, similar in that what, they have to once notify the State register?

MR. ROSENSTEIN: In -- in Washington?

CIRCUIT JUDGE REINHARDT: In -- yes.

MR. ROSENSTEIN: If -- I think they need to keep the information current under the Washington statute if I'm not mistaken.

CIRCUIT JUDGE REINHARDT: Well, but if you -- if you live in Anchorage or in Seattle, Washington and you notify the State, you're registered with the State. That's it for life, isn't it, if you don't -- if you just stay there?

MR. ROSENSTEIN: I -- if you don't -- if you don't move.....

CIRCUIT JUDGE REINHARDT: Yes.

MR. ROSENSTEIN: .....out of King County, yes, I believe that.....

CIRCUIT JUDGE REINHARDT: Yeah, so that's not exactly similar to the requirement that you report every three months to the police department and provide specific information about everything again, is it? I

mean, what I -- I understand that both are called sex registration statutes.....

MR. ROSENSTEIN: Well, I.....

CIRCUIT JUDGE REINHARDT: .....but other than that I don't see the similarity.

MR. ROSENSTEIN: They're similar in that you do have to provide this information and in Alaska it has to be -- it has to be updated or reconfirmed periodically.

CIRCUIT JUDGE REINHARDT: Well, rather than reconfirm periodically is it true that you have to go to the police station?

MR. ROSENSTEIN: Yes, it is.

CIRCUIT JUDGE REINHARDT: Four times a year?

MR. ROSENSTEIN: Under the current law, yes.

CIRCUIT JUDGE REINHARDT: All right. Well, so both states have sex registration statutes, we can say that, not much more about the similarity?

MR. ROSENSTEIN: Well, I -- I would respectfully disagree. I think that they are similar except the Alaska statute requires that an offender do more, but I think that there are still -- that still constitutes a similarity.

CIRCUIT JUDGE NELSON: Alaska requires more, but it's so much more. In fact, it's hard for me to discern what is left out. They have to -- the name, address, aliases, photographs, physical description, motor vehicles, license numbers of motor vehicles, et cetera, place of employment, date of birth, crime for

which convicted, date of conviction, place and court of conviction, length, conditions, et cetera, et cetera. It seems it just covers everything. Now the Washington statute appeared to be much less broad, am I incorrect in that?

MR. ROSENSTEIN: No, Your Honor, you're not.

CIRCUIT JUDGE NELSON: Right.

MR. ROSENSTEIN: The Washington statute requires less information. The requirement that an offender go reconfirm this information periodically in Alaska -- I mean, if not at -- a renewal form is, if I'm not mistaken, they just confirm any changes in the information from the prior contact. It's -- so it's not an onerous task to go in and provide this -- this information periodically.

CIRCUIT JUDGE NELSON: But this applies to all sex offenders in Alaska regardless of degree or grade of offense?

MR. ROSENSTEIN: Yes, it does, Your Honor, and that§s one of the.....

CIRCUIT JUDGE REINHARDT: And then it could also -- applies for life and there's no way to ever be rehabilitated?

MR. ROSENSTEIN: There's -- it applies for life for -- under the revised statute for some offenders, those offenders who have two or more sex -- sex offense convictions or I believe it's one of what the statute terms an aggravated sex offense conviction and it's defined in the statute.

CIRCUIT JUDGE REINHARDT: And for the others it's 15 years?

MR. ROSENSTEIN: Fifteen years from the date of their unconditional discharge.

CIRCUIT JUDGE REINHARDT: And there's no procedure for anyone who may have been totally rehabilitated or cured or treated or whatever to be removed from that requirement?

MR. ROSENSTEIN: Well, that's the -- a significant difference between the Alaska statute and the Washington statute. In Alaska the government has made no effort to predict the risk that an individual sex offender poses for recidivism. Instead the Alaska statute requires all persons who are defined as sex offenders to register and that allows the public to -- or those who are interested to determine for themselves whether a particular sex offender poses a risk to those members of the public who are -- who expressed the interest to learn that information.

CIRCUIT JUDGE REINHARDT: Does the record contain evidence that the State has posted all this information on the internet?

MR. ROSENSTEIN: I -- both -- both parties.....

CIRCUIT JUDGE REINHARDT: Agree?

MR. ROSENSTEIN: .....conceded that that is what has happened.

CIRCUIT JUDGE REINHARDT: Has that occurred in the case of any of the other statutes that have been upheld?

MR. ROSENSTEIN: I -- the case law does not -- I would say no. The case law doesn't mention it, most of the other statutes in the cases that I've reviewed provide for limited -- a more limited dissemination of information that interested members of the public can go to the police station or the agency that is in charge and request information about a particular person.

CIRCUIT JUDGE REINHARDT: And I think in some they may notify the people in the neighborhood?

MR. ROSENSTEIN: That's under the Washington statute.....

CIRCUIT JUDGE REINHARDT: Yeah.

MR. ROSENSTEIN: .....where there is some actual active notification that the State goes out and informs citizens that there is a sex offender living in the neighborhood.

CIRCUIT JUDGE REINHARDT: What would you say is the statute that has been upheld by an appellate court that most closely resembles the Alaska statute?

MR. ROSENSTEIN: I could -- I don't think any of them closely resemble the Alaska statute in this particular respect where the Alaska statute provides for the public to have access to this information without any sort of filtering. As in Washington where -- when the government decides to disclose information that is in essence an endorsement, a government endorsement, that this person still poses a danger. As I've said the Alaska legislature took a different path and didn't.....

CIRCUIT JUDGE THOMAS: Why doesn't that indicate to you that the Washington statute is regulatory and this is punitive? Because the -- in Washington the

State is making some efforts to regulate, it is taking some affirmative steps and here the information is simply posted?

MR. ROSENSTEIN: It would be unprecedented to characterize posting information as -- as a punitive measure in -- in my (indiscernible - simultaneous speech).....

CIRCUIT JUDGE THOMAS: Well, let me turn the question around before you -- before you get too far. What is regulatory about this scheme?

MR. ROSENSTEIN: It is regulatory in that it provides the people of the State of Alaska with information by which they can take -- they can determine whether it is necessary for them to take steps to protect themselves against a sex offender and if so, what steps to take. And I can tell you -- I can share a personal experience where I§ve gone on the internet and checked for sex offenders living in my neighborhood and I discovered one two blocks away. And you can tell.....

CIRCUIT JUDGE REINHARDT: Do you want to tell us what you did about it, is that part of the personal experience that.....

MR. ROSENSTEIN: Pardon me?

CIRCUIT JUDGE REINHARDT: Are you going to tell us what you did about it --- I mean.....

MR. ROSENSTEIN: I -- I guess I -- I will with the court's indulgence?

CIRCUIT JUDGE REINHARDT: Well, I don't -- you said you wanted to tell us your personal experience about it?

MR. ROSENSTEIN: I could tell by -- I surmised by the description of the offense of which this person was convicted that it was a -- in the spectrum of sex offenses, a relatively benign offense from many years ago. And all I did was tell my daughter where he lived and told her to be careful. I just made her aware. That's -- in that respect -- you know, a person such as -- such as myself assesses the risk and takes -- takes the appropriate action.

CIRCUIT JUDGE THOMAS: Well, you're a trained lawyer. I mean, how is somebody supposed to make that judgment independently? For example, I mean, you have everything there from indecent exposure potentially to child kidnapping which I assume under certain conditions might involve a custody battle and all those are lumped together with the most heinous of sex offenses without any effort to -- by the State to distinguish among them -- those offenses, right?

MR. ROSENSTEIN: Correct. And -- I mean, there's a good reason for that because the State -- there are no sound tools for predicting a person's dangerous -- or dangerousness.

CIRCUIT JUDGE THOMAS: Well, if you can't predict danger at all then this information could be very misleading? If it's not a predictor of dangerousness, why give the information?

MR. ROSENSTEIN: Well, it's.....

CIRCUIT JUDGE THOMAS: I means it's obvious what the harm in giving information is, if it's not a predictor of danger then what's the benefit?

MR. ROSENSTEIN: It is not always an accurate predictor of dangerousness. I mean, there are many who think -- and I think it's the general belief that a person's past conduct is indicative of their future conduct and in some regards it's very relevant as to their future conduct. And I -- the evidence rules prove -- put strict limits on the use of past conduct as a.....

CIRCUIT JUDGE REINHARDT: See I just had -- I think you can't have it both ways. You probably can't come in and say well, this is an important thing to do, but it's not a predictor of dangerousness? You'd have to say it is a predictor of dangerousness and then you've got to answer the questions Judge Thomas was asking you about the broad scope of it. Or if you say it's not a predictor of dangerousness then I don't see any way to refute this and any justification for this statute at all?

MR. ROSENSTEIN: I may have misspoke myself if I've -- if I've suggested that it's not a predictor of dangerousness. I think that past conduct is a predictor of dangerousness, but the State has determined that it should not -- that it should not be in the business of determining, trying to assess and determine with any precision what that danger is.

CIRCUIT JUDGE THOMAS: Is it your position that all these other states who have undertaken that task are engaged in an idle exercise, that they have no ability based on their experience with law enforcement to accurately predict the level of risk?

MR. ROSENSTEIN: No, I -- I wouldn't say that that's the wrong path to take, I think it's -- it errs on the side of caution and.....

CIRCUIT JUDGE NELSON: Aren't you suggesting that there is always some potential risk with a sex

offender, but the degree of dangerousness is unpredictable?

MR. ROSENSTEIN: That's -- I think that is the assumption here that -- that sex offenders statistically are a dangerous group of offenders and that they do have a high rate of recidivism. And there are some who commit their offense and are punished and they learn from that and they lead a good life and don't reoffend and that's great.

CIRCUIT JUDGE THOMAS: But how can you put somebody really as a -- if you're broadly categorizing these folks as sex offenders how can you put somebody in the same category as a multiple rapist as a person who has abducted their own child in a custody dispute and is subject to criminal penalties? I think you'd have to agree that the relative risk is different and yet they're treated the same?

MR. ROSENSTEIN: They're treated the same as that -- in that the public is given that information. I mean, this is -- that information is publicly available irrespective of sex offender registration.

CIRCUIT JUDGE THOMAS: No, the convictions are, but the location, address, everything -- and those -- that information that they provide you is not necessarily readily available?

MR. ROSENSTEIN: It -- it is.....

CIRCUIT JUDGE REINHARDT: If it's so -- if it is readily available then we don't really need this statute?

MR. ROSENSTEIN: The statute brings the information together.

CIRCUIT JUDGE REINHARDT: So -- I mean, it must have some substantial affect or you wouldn't be bothered to be here over this statute.....

MR. ROSENSTEIN: Well.....

CIRCUIT JUDGE REINHARDT: .....if it's just, you know, the fact that it gives us all this information that's just as easily available any way and without really doing anything?

MR. ROSENSTEIN: It -- it brings the information together, it -- in one place whereas it would -- people would have to go to various court locations to learn of conviction information. Although conviction information is available from a central location independent of sex offender registration for a period of 10 years after a conviction -- or after the unconditional discharge under State law. But it – it's not – it's not a futile exercise because -- because of the particular danger imposed by sex offenders it brings that information together. It makes -- the legislature has determined that certain sex offenders who have been -- who are multiple sex offenders or may have been convicted of aggravated sex offenses are -- should be subject to lifetime registration so that during their lives the people will always be able to obtain information about them.

Let me address the -- the address -- the issues of their addresses. The Alaska Court of Appeals determined that there is -- there is not a sufficient privacy interest in a person's address that would -- that would invalidate this -- this statute. If I'm not mistaken I thought it was in Russell that this court addressed that and reached the same conclusion. If it wasn't -- if it wasn't this court this then it was in -- I think it was Paul P. from the Third Circuit and -- and the privacy -- the privacy interest in an address is -- really represents a balance and it.....

CIRCUIT JUDGE THOMAS: You said that it represents a balance, would you agree that it puts an obligation on the State to narrowly tailor the statute?

MR. ROSENSTEIN: It -- no. I think that the determination that sex offenders should register and provide this information is sufficient and that the public -- the risk to public safety posed by sex offenders is sufficient to require that -- the disclosure of their addresses.

CIRCUIT JUDGE THOMAS: So really in your view there's not any balancing to be done?

MR. ROSENSTEIN: Well, the balancing is that the general risk posed by sex offenders is substantial enough and a person's privacy interest in their address is -- is low enough that the privacy interest yields. And the -- the addresses are interesting because they are available from alternate choices, your neighbors know your address, you co-workers know your address, your employer knows your address. There are a host of -- it is not a private piece of information such as your medical records. So the privacy interest in an address is quite low. I'd like to sum up by saying that the Alaska legislature in enacting this statute had in mind and intended it to be a remedial statute in order to allow the public to assess the risk of sex offenders for themselves and to take steps that they might deem necessary to protect themselves from that risk. The effects of the statute are similarly remedial. The Does have -- you know, they've said that it amounts to supervision and there's nothing supervisory about this. The people who are required to register are free to come and go and do as they please, but they do have to register and go to the police -- a police station four times a year. But they can conduct their lives in any manner -- in any lawful

manner that they see fit. It does not amount to any supervision, they are free to come and go, they don't need anybody's permission. Supervision implies an element of control and the -- other than requiring them to register, the statute asserts no control over these individuals. In sum, it is not an ex post facto piece of legislation and it does not violate any of the Does' rights.

CIRCUIT JUDGE REINHARDT: Thank you, counsel.

MR. ROSENSTEIN: Thank you.

(END OF REQUESTED PORTION)

* * * * * *

TRANSCRIBER'S CERTIFICATE

I, Lynn Hall, hereby certify that the foregoing pages numbered 02 through 14 are a true, accurate, and complete transcript of proceedings in Docket No. 99-35845, *John Doe I, Jane Doe, and John Doe, II, vs. Ronald Otte, et al*, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

12/03/01

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Alaska Constitution art. I, § 12 (pre-1994)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

Alaska Constitution
art. I, § 22

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

U.S. Constitution
art. I, § 9

No bill of attainder or ex post facto law shall be passed.

ALASKA COURT RULES

Alaska Rules of Criminal Procedure Rule 11(c)

(c) Pleas of Guilty or Nolo Contendere. The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

(1) determining that the defendant understands the nature of the charge; and

(2) informing the defendant that by a plea of guilty or nolo contendere the defendant waives the right to trial by jury or trial by a judge and the right to confront adverse witnesses; and

(3) informing the defendant:

(i) of the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered, and

(ii) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty; and

(4) if the defendant is charged with a sex offense as defined in AS 12.63.100, informing the defendant in writing of the requirements of AS 12.63.010.

(5) in cases when a plea agreement has been accepted by a court, informing the defendant:

(i) that the defendant waives the right to appeal a sentence as excessive and waives the right to seek reduction of a sentence under Criminal Rule 35 if a plea agreement between the defendant and the prosecuting attorney provides for a specific sentence or a sentence equal to or less than a specified maximum; and

(ii) that the defendant waives the right to appeal as excessive that portion of a sentence that is less than or equal to a minimum sentence specified in a plea agreement between the defendant and the prosecuting attorney and waives the right to seek reduction of a sentence under Criminal Rule 35 to a length less than the length of the minimum sentence.

Alaska Rules Of Criminal Procedure
Rule 32. Sentencing And Punishment

(a) Sentence. Sentence shall be imposed without unreasonable delay. Sentencing in felony cases shall follow the procedures established in this rule and Rules 32.1 through 32.5. Sentencing in misdemeanor cases shall follow the procedures established in this rule and Rules 32.2(b)-(f), 32.3, and 32.5.

(b) Judgment--Execution.

(1) Execution. The judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. At the time of imposition of sentence, the judge or magistrate shall make a statement on the record explaining the reasons for imposition of the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge or magistrate. When the sentence includes a term of incarceration, the clerk shall promptly deliver a copy of the judgment to a peace officer or correctional facility. If the defendant does not appear at the correctional facility at the time specified, the peace officer or a representative of the correctional facility shall promptly notify the court by affidavit.

(2) Conviction of a Corporation. If a corporation is convicted of any criminal offense, the judge shall enter judgment against the corporation and shall cause such judgment to be enforced in the same manner as a judgment in a civil action, or as otherwise provided by law.

(c) Judgment for Sex Offenses. When a defendant is convicted of a sex offense defined in AS 12.63.100, the

written judgment must set out the requirements of AS 12.63.010.

(d) Judgment for Crimes Involving Domestic Violence. In a case in which the defendant is convicted of an offense listed in AS 18.66.990(3) and the prosecution claims at sentencing that the offense is a crime involving domestic violence, the court must determine whether the offense is a crime involving domestic violence as defined in AS 18.66.990(3) and (5). This determination must be made on the record and noted on the judgment.

(e) Judgment for Crime Against a Person. [Pub. Note: Laws 1998, c. 95, § 11 amended Rule 32 by adding new subsection 32(e) to read as follows.] In a case in which the defendant is convicted of a crime against a person as defined in AS 44.41.035(j), the written judgment must set out the requirements of > AS 12.55.015(i).

[Amended effective August 15, 1987; August 28, 1989, by Laws 1989, c. 59, §§ 26, 27; January 15, 1990; July 15, 1990; January 15, 1991; September 15, 1991, by Laws 1991, c. 57, §§ 19, 20; July 15, 1992; repealed and reenacted effective July 15, 1993; amended effective July 15, 1995; January 15, 1998; amended by Laws 1998, c. 95, § 11.]

Note

Paragraphs (g) and (h) were added by ch. 59, § 27, SLA 1989 and amended by ch. 57, §§ 19 & 20, SLA 1991. Subparagraph (d)(1) was amended by ch. 59 § 26, SLA 1989.

The requirement that a judgment for conviction of a sex offense must set out the requirements of AS 12.63.010 was added by ch. 41, § 3, SLA 1994. Section 7 of [SCO

1204] is adopted for the sole reason that the legislature has mandated the amendments.

ALASKA STATUTES

Alaska Statute
§ 11.51.100(a)(2)(A)

Endangering the welfare of a child in the first degree.

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person

(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

Alaska Statute
§ 11.56.835

Failure to register as a sex offender or child kidnapper in the first degree

(a) A person commits the crime of failure to register as a sex offender or child kidnapper in the first degree if the person violates > AS 11.56.840

(1) and the person has been previously convicted of a crime under this section or > AS 11.56.840 or a law or ordinance of this or another jurisdiction with elements similar to a crime under this section or > AS 11.56.840; or

(2) with intent to escape detection or identification and, by escaping detection or identification, to facilitate the person's commission of a sex offense or child kidnaping.

(b) In a prosecution under (a)(2) of this section, the fact that the defendant, for a period of at least one year, failed to register as a sex offender or child kidnapper, failed to file the annual or quarterly written verification or changed the sex offender's or child kidnapper's address and did not file the required notice of change of address, is prima facie evidence that the defendant intended to escape detection or identification and, by escaping detection or identification, to facilitate the person's commission of a sex offense or child kidnaping.

(c) In this section, "child kidnaping" and "sex offense" have the meanings given in > AS 12.63.100.

(d) Failure to register as a sex offender or child kidnapper in the first degree is a class C felony.

Added by Laws 1998, c. 106, § -, eff Jan. 1, 1999.

Alaska Statute
§ 11.56.840 (1994)

A person who knowingly fails to (1) register, (2) file the written notice of change of address, or (3) file the annual written notice or statement, as required in AS 12.63.010, is guilty of a class A misdemeanor. (§ 2 ch 41 SLA 1994).

Alaska Statute
§ 12.55.185(15)

(15) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole;

Alaska Statute
§ 12.63.010 (1994)

Registration of sex offenders and related requirements
(a) A sex offender who is physically present in the state shall register as provided in this section. The sex offender shall register within

(1) seven days of release from an in-state correctional facility;

(2) seven days of conviction for a sex offense if the sex offender is not sentenced to a term of incarceration; or

(3) 14 days of becoming physically present in the state, except the sex offender shall register within seven days of becoming physically present in the state if the sex offender

(A) is a probationer or parolee being supervised by the state as the receiving state under AS 33.36.110 - 33.36.120; or

(B) has been released from an out-of-state correctional facility where the sex offender was serving a term of incarceration for a sex offense conviction in this state.

(b) A sex offender required to register under (a) of this section shall register in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender resides at the time of

registration. To fulfill the registration requirement, the sex offender shall

(1) complete a registration form that includes, at a minimum, the sex offender's name, address, place of employment, date of birth, each conviction for a sex offense for which the duty to register has not terminated under AS 12.63.020, date of sex offense convictions, place and court of sex offense conviction, all aliases used, and driver's license number;

(2) allow the Alaska state troopers or municipal police to take a complete set of the sex offender's fingerprints and to take the sex offender's photograph.

(c) If a sex offender changes residence within the state after having registered under (a) of this section, the sex offender shall provide written notice of the change to the Alaska state trooper post or municipal police department located nearest to the new residence within 10 days of the change.

(d) A sex offender required to register under (a) of this section shall annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's initial registration, provide written notice to the department of any changes to the information initially provided under (b)(1) of this section, or if there are no changes, a statement to that effect.

(e) In this section, "correctional facility" has the meaning given in AS 33.30.901. (§ 4 ch 41 SLA 1994).

Alaska Statute
§ 12.63.020 (1994)

Duration of sex offender duty to register. (a) The duty of a sex offender to comply with the requirements of AS 12.63.010 for each sex offense

(1) continues for the lifetime of a sex offender convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's unconditional discharge from a conviction for a single sex offense.

(b) The department shall adopt, by regulation, procedures to notify a sex offender who, on the registration form under AS 12.63.010, lists a conviction for a sex offense that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's duty under (a) of this section for that sex offense. (§ 4 ch 41 SLA 1994)

Alaska Statute
§ 12.63.100 (1994)

Definitions. In this chapter,

(1) "department" means the Department of Public Safety;

(2) "sex offender" means a person convicted of a sex offense in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on August 10, 1994;

(3) "sex offense" means a crime, or an attempt to commit a crime, under AS 11.41.410 - 11.41.438, 11.41.450, 11.41.455, AS 11.61.125, AS 11.66.110, former AS 11.15.120 or 11.15.134, or former AS

11.40.110 or 11.40.200, or a similar law in another jurisdiction;

(4) "unconditional discharge" has the meaning given in AS 12.55.185. (§ 4 ch 41 SLA 1994)

Alaska Statute
§ 18.65.087 (1994)

Central registry of sex offenders. (a) The Department of Public Safety shall maintain a central registry of sex offenders required to register under AS 12.63.010 and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders.

(b) Information about a sex offender that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender to review sex offender registration information that refers to that sex offender, and if the sex offender believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(2) shall provide to municipal police department s the forms and directions necessary to allow sex offenders to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders under AS 18.65.087 information about a sex offender required to register under AS 12.63.020 (a)(2) at the end of the sex offender's duty to register if the offender has not been convicted of another sex offense; in this paragraph, "sex offense" has the meaning given in AS 12.63.100.

Alaska Statute
§ 34.70.050 (1998)

Form of disclosure statement.

The Real Estate Commission established under AS 08.88.011 shall establish the form of the disclosure

statement required by AS 34.70.010. The disclosure statement must include a provision that notifies transferees

(1) that they are responsible for determining whether a person who has been convicted of a sex offense resides in the vicinity of the property that is the subject of the transferee's potential real estate transaction; and

(2) where information about the location of convicted sex offenders can be obtained.

Alaska Statute
§ 47.10.011(7) (1998)

Children in need of aid.

Subject to AS 47.10.019, the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following:

(7) the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to adequately supervise the child; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor within the past 15 years, is registered or required to register as a sex offender under AS 12.63, or is under investigation for a sex offense against a minor, and the parent, guardian, or custodian subsequently allows a child to be left with that person, this conduct constitutes prima facie evidence that the child is at substantial risk of being sexually abused;

COPY (3)

No. 01-729

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

RONALD O. OTTE AND BRUCE M. BOTELHO, *Petitioners,*

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AND THE STATES OF ALABAMA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, MARYLAND, MASSACHUSETTS, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON, AND WEST VIRGINIA

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QUESTION PRESENTED

Alaska's sex offender registration act requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The department elected to publish the information on the Internet. Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the *Ex Post Facto Clause* of the United States Constitution?

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Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure,* 3 Buff. Crim. L.Rev. 593, 598-599 (2000)	

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-729

RONALD O. OTTE AND BRUCE M. BOTELHO, *Petitioners,*

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II, *Respondents.*

AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA
ex rel. BILL LOCKYER, ATTORNEY GENERAL

Amici file this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

This brief is respectfully submitted in support of the petition for writ of certiorari by petitioner, the State of Alaska, which urges reversal of *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). In an opinion authored by Judge Reinhardt, the Ninth Circuit held Alaska's sex offender registration and notification laws violated the Ex Post Facto Clause of the United States Constitution, reversing the decision of the Alaska district court.

All the states have a strong interest in monitoring the whereabouts of convicted sex offenders, and in disseminating information about such offenders to protect the public safety. All 50 states require registration by sex offenders, and most have some form of community notification regarding sex offender registrants. Twenty-eight states use the Internet to

disseminate information about registered sex offenders. As an example, California has the oldest sex offender registration statute in the country. California Penal Code section 290, was enacted in 1947 (made legislatively retroactive to 1944)[1], and currently there are 92,646[2] registered sex offenders in California. In 1996, California enacted its notification law, known as Megan's law.

The California Supreme Court has held that California's sex offender registration law (Cal. Pen. Code, § 290)[3] does not violate the Ex Post Facto Clause of the United States Constitution. *People v. Castellanos*, 21 Cal.4th 785 (Cal. Sup. Ct. 1999). The registration and public notification provisions of the California law were made expressly retroactive by the California Legislature. Cal. Pen. Code, § 290, subd. (r). The California sex offender registry includes persons convicted of specified sex offenses since 1944, and public notification is available on a majority of these registrants.

If the Ninth Circuit, following the rationale in *Doe v. Otte*, found California's notification law to violate the Ex Post Facto Clause, the state would be unable to alert the public to the presence of in excess of approximately 60,000 sex offenders convicted and registered prior to the enactment of California's

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1. Cal. Stats. 1947, ch. 1124, § 1.

2. Figure current as of November 9, 2001. Of those 92,646 registered sex offenders, 1,603 are statutorily designated high risk; 75,013 are designated serious sex offenders; and 16, 030 are "other" sex offenders, meaning their status as convicted sex offenders is not subject to public disclosure or notification under California's Megan's Law. Cal. Pen. Code §§ 290, subd. (n); 290.4, subd. (a).

3. The California Supreme Court has not considered the constitutionality of California's Megan's Law (public notification law), which is codified at California Penal Code section 290, subdivisions (m)-(r), and California Penal Code section 290.4.

notification law in 1996. Thus the Ninth Circuit's decision in *Doe v. Otte* may significantly affect California's ability to protect its citizens, as well as the ability of other states to notify the public about sex offenders convicted prior to the enactment of the state's notification law.

California is additionally interested in the outcome of this case because pending in the California Legislature is a bill, sponsored by the Attorney General of California, which would create an Internet site which would allow persons with a valid California driver's license to view information about convicted sex offenders who reside in the viewer's county of residence.[4] Other states which may also wish to utilize new technology as a more effective means of public protection may have similarly enacted restricted notification statutes due to the lack of guidance from this Court on the constitutionality of such laws. The 28 states which have utilized the Internet as a means of notifying the public about registered sex offenders also have a strong interest in having the constitutionality of such notification settled by this Court. States which are considering modifying their sex offender notification laws are similarly in need of guidelines for enacting legislation in their respective states which will pass constitutional muster.

REASONS FOR GRANTING THE PETITION

Amici urge this Court to grant the petition because this is an issue of overriding importance to all fifty states, in that all the states have sex offender registration and notification laws, and federal funding to the states is conditioned on

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4. Only those registrants whose convictions are subject to public disclosure under California law would be listed on the proposed Internet site. California S.B. 721 (Battin), 2001-2002, Regular Session, available at http://www.leginfo.ca.gov/bilinfo.html.

compliance with federal law requiring the states to enact certain provisions in their sex offender registration and notification statutes.

Additionally, the states have a compelling public interest in monitoring the whereabouts of convicted sex offenders, which interest is frustrated by prohibiting the retroactive application of sex offender registration and notification laws. While the states' notification schemes vary, at least 28 states disseminate information about registered sex offenders in their states on the Internet, as did Alaska. Alaska's sex offender registration and notification requirements are no more onerous than the laws of many states, so if Alaska's law was properly construed as punitive, then it is possible that a majority of the states' laws, including California's, would be found violative of the Ex Post Facto Clause.

Finally, the vast majority of state and federal courts which have examined the issue ruled that the retroactive application of state sex offender registration and notification laws does not violate the Ex Post Facto Clause. Accordingly, amici urge this Court to grant the petition for certiorari because the Ninth Circuit's ruling in *Doe v. Otte* was contrary to this Court's precedent and to Constitutional intent and conflicts with the decision of another United States court of appeals on the same important issue. Sup. Ct. R. 10.

I.

THE FEDERAL MANDATE TO THE STATES REGARDING ENACTMENT OF SEX OFFENDER NOTIFICATION AND REGISTRATION LAWS MAKES THIS AN ISSUE OF NATIONAL IMPORTANCE

The states are required to conform state law to a series of federal laws and regulations pertaining to sex offender registration and notification or forfeit a substantial portion of

the state's federal crime funding.[5/] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (hereinafter "Wetterling Act"), enacted by Congress in 1994, sets out minimum standards for sex offender registration with which the states must comply. Subsequent Congressional acts mandated that the states enact additional laws in order to meet the requirements for federal funding.

The Wetterling Act specifies that the states must obtain particular registration information from designated sex offenders, requires eligible sex offenders to remain registered for at least ten years, and mandates that states release "relevant information that is necessary to protect the public concerning a specific person required to register."[6/] States must register persons convicted of a sex offense against a minor victim and

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5. Jacob Wetterling Act, 42 U.S.C. § 14071, subd. (g)(2): "A state that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756 of this title." In California, in 2001, this would have meant that noncompliance with the Wetterling Act and subsequent enactments (see text) would have cost the state 5.15 million dollars per year in Byrne Formula Grant Funding (42 U.S.C. § 3756.). California Senate Appropriations Committee Fiscal Summary on AB 4 (2001-2002 Regular Session), http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/ab_4_cfa_20010910_154244_sen_comm.html (last visited on Nov. 20, 2001.)

6. Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L.Rev. 593, 598-599 (2000) [hereinafter cited as "Logan"]; 42 U.S.C. § 14071 (1994 & 1999 Supp.); Final Guidelines for the Wetterling Act, as amended, 64 Fed. Reg. 572 (issued Jan. 5, 1999, amended Jan. 22, 1999.)

those convicted of sexually violent offenses.[7/] The states must require registrants to submit changes of address to the state, and verify the address "at least annually." 42 U.S.C. § 14071, subd. (b)(1)(A), (b)(3)(A).

The federal guidelines establish minimum standards, or a floor, not a ceiling, for sex offender notification and registration laws. 64 Fed. Reg. at 575. Although the Wetterling Act requires that registered information be released 'as necessary to protect the public,' federal requirements on the geographic scope, method and extent of registration information disseminated were ill-defined as to how the states were to comply with the required mandate for public protection. While the federal guidelines did not mandate retroactive application of states' notification laws, they stated that "the Act does not preclude states from applying such standards retroactively to offenders earlier if they so wish." 64 Fed. Reg. at 581. However, the guidelines also state that states cannot comply with the act by releasing registration information only to law enforcement agencies, to other governmental or non-governmental agencies or organizations, to prospective employers, or to victims of the registrants' offenses; nor can the states comply by having "purely permissive or discretionary authority for officials to release registration information." 64 Fed. Reg. at 581.

Part of the rationale used by the Ninth Circuit Court of Appeals in *Doe v. Otte,* 259 F.3d 979, was that certain aspects of Alaska's sex offender registration and notification laws rendered the laws punitive and therefore unconstitutional as applied to respondents. Of the approximately eleven factors the Ninth Circuit relied on to find Alaska's Act punitive, *five* were specifically required by Wetterling, et al. Thus, under the Wetterling Act and subsequent enactments, Alaska's failure to implement such laws would require it to forfeit ten percent of

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7. See fn.6, *supra*.

the state's federal crime funding.[8/]

The Ninth Circuit held that under the first *Mendoza-Martinez* factor, i.e., whether the law involved an affirmative disability or restraint,[9/] the Alaska statute imposed an affirmative disability by subjecting sex offenders to "onerous conditions." *Doe v. Otte*, 259 F.3d 987-988. However, a number of the factors which the Court found rendered the statute onerous are required to be implemented by the states by the Wetterling Act, et al.

The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (hereinafter "Lychner Act") requires the states to impose lifetime registration for offenders with one or more prior qualifying convictions and those with certain aggravated offenses. 42 U.S.C. § 14071, subd. (b)(6)(B)(i)-(ii). The federal guidelines note that states which allow such offenders to be relieved of registration in less than ten years, under any procedure for terminating registration, are not in

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8. Jacob Wetterling Act, 42 U.S.C. § 14071, subd. (g)(2). In California, in 2001, noncompliance with the Wetterling Act and subsequent enactments (see text) would have cost the state 5.15 million dollars per year in Byrne Formula Grant Funding (42 U.S.C. § 3756.). California Senate Appropriations Committee Fiscal Summary on AB 4 (2001-2002 Regular Session), http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/ab_4_cfa_20010910_154244_sen_comm.html (last visited on Nov. 20, 2001.)

9. The Ninth Circuit determined that the Alaska legislature's intent was that the statute be non-punitive, but ruled that the "effect" of the statute was so punitive that it violated the Ex Post Facto Clause. *Doe v. Otte*, 259 F.3d at 987. In deciding the effect of the law was punitive, the Ninth Circuit purported to apply the seven factors enunciated by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

compliance with federal law. 64 Fed. Reg. at 576, 582-583. Yet Ninth Circuit in *Doe v. Otte* found Alaska's registration law excessive in part because Alaska did not provide a process by which sex offenders could be relieved of registration upon a finding of rehabilitation, apparently without regard to a minimum registration period. *Doe v. Otte*, 259 F.3d 991-992.

Second, in 1998 Congress enacted heightened registration and notification requirements for "sexually violent predators."[10/] Federal law requires that sexually violent predators verify their address information quarterly (more frequently than is required for other offenders) and remain subject to registration and notification requirements for life. 42 U.S.C. § 14071, subd. (b)(3)(B).

Nevertheless, the Ninth Circuit disapproved the Alaska law's requirement that certain sex offenders (those convicted of "aggravated" offenses) reregister four times a year. The Ninth Circuit relied heavily on the fourth *Mendoza-Martinez* factor, whether a statute promotes traditional aims of punishment, in finding Alaska's law punitive. *Doe v. Otte*, 259 F.3d at 990. The Ninth Circuit cited the quarterly reregistration requirement imposed on certain sex offenders, which is mandated by the Wetterling Act, as a provision which rendered the Alaska law punishment.

Third, Congress required that the states obtain the name, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the registrant. 42 U.S.C. § 14071, subd. (b)(1)(B). The Ninth Circuit found the information required to be given under oath constituted "a wide variety of personal information," implying the requirement the sex offender provide his address, employer address, vehicle description, and information concerning mental health treatment

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10. Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act. 42 U.S.C. § 14071, subd. (a)(2), (a)(3)(C)-(E), (b)(1)(B), (b)(3)(B), (b)(6)(B)(iii) (Supp. 1999).

for any mental abnormality or personality disorder, was onerous as well.

Fourth, the Ninth Circuit appeared to find that mandated annual reregistration contributed to rendering Alaska's Act punitive in effect. The Court noted that Washington's sex offender registration statute, which was upheld against a ex post facto challenge in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), did not require annual reregistration, whereas Alaska's law requires annual address verification. In fact, the Wetterling Act was enacted in 1994, after Washington's sex offender registration law was enacted in 1990. The Wetterling Act required the states to mandate annual reregistration (see above), and every state which wishes to receive federal crime funding, including Washington today, requires annual reregistration or address verification.[11/]

Fifth, under the Wetterling Act, certain sex offenders are required to disclose information regarding employment if they are employed or carry on a vocation at an institution of higher learning. 42 U.S.C. § 14071, subd. (j). The Ninth Circuit in *Doe v. Otte* found that Alaska's registration law imposed an affirmative disability in part because offenders were required to disclose the names and addresses of their employers, stating that requiring submission of employer information was "likely to make the plaintiffs completely unemployable. . . ." and that publication of this information created "a substantial probability that registrants will not be able to find work. . . ." *Doe v. Otte*, 259 F.3d at 988. The court found that posting the sex offender registry on the Internet subjected registrants to "community obloquy and scorn," because the information was "more accessible to the public than records at police departments. . . ." *Doe v. Otte*, 259 F.3d at 988.

Five of the factors pertaining to Alaska's sex offender registration and notification laws, which the Ninth Circuit found created an affirmative disability and rendered the law excessive in relation to its purpose, are required by the Wetterling Act and

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11. Wash. Rev. Code § 9A44.135(1)(a), (b).

its progeny. All the states which wish to continue to receive the full amount of federal crime funding under the Byrne Act are required to mandate quarterly reregistration for certain sex offenders, to require a minimum registration period of ten years for all registered sex offenders (regardless of a finding of rehabilitation), and to require annual reregistration and address verification to obtain certain registrant information, including the name of the registrant's employer. Thus, all fifty states have an interest in the resolution of the issue posed in this case because their receipt of substantial federal crime funding depends on their ability to comply with federal law, yet full compliance may be impossible if the Ninth Circuit was correct in its construction of the Ex Post Facto Clause as it applies to Alaska's sex offender registration and notification law.

II.

MANY OTHER STATES HAVE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS SIMILAR TO ALASKA'S

All fifty states have sex offender registries which require sex offenders to submit personal information to a state registry.[12/] While the requirements of the states' registration laws vary widely, in general the statutes require registrants to submit information similar to that required by Alaskan law.[13/]

The states have disparate laws regulating which sex

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12. Logan, *supra* note 6, at 602; Comment, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 Me. L. Rev. 175, 206 (2000)[hereinafter "Comment"].

13. Comment, *supra* note 11, at 207. Information such as name, current address, prior convictions, dates of commission and conviction of such offenses, date of birth, current place of employment, physical description of the registrant, photograph and fingerprints is frequently required.

offenders are required to register, the duration of that requirement, and reregistration and address verification requirements.[14/] A review of the duration requirements for registration indicates that most states mandate a minimum registration period of ten years and many states require longer periods, up to and including lifetime registration, for more serious offenders.[15/]

State statutes vary more in their notification provisions than in their registration laws. Every state has some version of Megan's Law.[16/] At least 19 states require that all offenders convicted of specified sex offenses undergo public notification without an individualized assessment of the risk of recidivism.[17/] There are 28 states which post information about registrants on the Internet, although some postings do not contain the entire state's registry, but are postings by individual police jurisdictions of offenders in their jurisdiction.[18/] In New Jersey, the first state to enact a Megan's Law, the people approved a new law on November 7, 2000, amending the New Jersey Constitution to allow the legislature to create an Internet

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14. A summary of the fifty states' registration statutes, state by state, is posted at http://www.klaaskids.org/pg-legmeg.htm. [hereinafter "Klaaskids.org"] (last visited Nov. 14, 2001).

15. Klaaskids.org, *supra* note 13.

16. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric,* 76 Ind. L.J. 315, 316 (Spring 2001); Comment, 2001 J.L. & Pol'y 879, 928.

17. Logan, *supra* note 6, at 603.

18. Http://www.parentsformeganslaw.com/html/links/lasso, (last visited on November 29, 2001); see, e.g., Minn. Stat. 243.166(7) (state may make information on registrants out of compliance with registration laws available to public by "electronic, computerized, or other accessible means").

registry which could disclose the identify, specific whereabouts, physical characteristics and criminal history of sex offenders. Comment, 2001 J. L. & Policy 879, 928, fn. 110.

In sum, many states' sex offender registration laws contain the features which the Ninth Circuit in *Doe v. Otte* held created an affirmative disability and rendered the law excessive in relation to its purpose. Additionally, 28 states or local jurisdictions therein post registrant information on the Internet, a notification system which the Court in *Doe v. Otte* found punitive because it disseminated information beyond the local community, and 19 states disclose information about their registered sex offenders without an individualized risk assessment, as did Alaska. Thus, a decision by this Court regarding the extent to which the states have discretion to regulate sex offenders within their jurisdictions in order to ensure the public safety would resolve widespread questions regarding the constitutionality of the laws enacted by many of the states.

III.

THERE IS A SPLIT IN THE FEDERAL CIRCUITS AND STATE SUPREME COURTS REGARDING WHETHER RETROACTIVE APPLICATION OF SUCH LAWS VIOLATES THE EX POST FACTO CLAUSE

In contrast to the Ninth Circuit's ruling in *Doe v. Otte,* the vast majority of federal and state courts which have been confronted with the issue of the validity of sex offender registration and notification statutes found the laws did not violate the Ex Post Facto Clause.

In the most recent decision on this issue by a United States appellate court, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), the Tenth Circuit upheld the Utah sex offender registration and notification law against an ex post facto

challenge. Utah's statute was expressly retroactive and all the information in its sex offender registry was made public via the Internet. Reversing the district court, the Tenth Circuit noted that the lower court had placed undue emphasis on the apparent absence of procedural safeguards and potentially unlimited disclosure of the registry information over the Internet, ignoring this Court's specific disapproval in *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 493, 139 L. Ed.2d 450 (1997) of just such an approach, which placed undue emphasis on excessiveness. *Femedeer,* 227 F.3d at 1249-1250. The Tenth Circuit found that notification by itself did not prohibit sex offenders from pursuing any vocation or avocation available to other members of the public (*Femedeer*, 227 F.3d at 1250), in contrast to the Ninth Circuit's holding that public disclosure would likely make a sex offender "completely unemployable," creating an affirmative disability. *Doe v. Otte*, 259 F.3d at 988.

The Sixth Circuit held in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) that the Tennessee sex offender registration and notification laws were not ex post facto. The Sixth Circuit utilized the two-part approach suggested by this Court in *Hudson v. United States*, 522 U.S. 93, 99 (the intent/effects test), and applied the factors enunciated in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144. In finding that the statute was not punitive in intent or effect, the Sixth Circuit observed that the registrant need only notify the registering authority where he lives, where he works, and other basic data; that he was free to live where he chose, to come and go as he pleased; and seek any employment he wished. The public notification provisions which allowed law enforcement to release registry information when necessary to protect the public, were not tantamount to imprisonment. This imposed no restraint whatever upon the activities of a registrant. *Cutshall* at 474-476. The fact that registrants were required to disclose employment information was a deterrent, but did not make the law punitive. *Cutshall* at 476, 480.

In *Russell v. Gregoire*, 124 F.3d 1079 it was held that Washington's registration and notification statutes were

intended to be regulatory, not punitive, and that the effect of those statutes was not so punitive as to overcome the clear regulatory intent; consequently, the laws did not violate the Ex Post Facto Clause. The Ninth Circuit in *Doe v. Otte* attempted to distinguish the Washington registration statute from Alaska's, but in fact there was no significant difference between Washington's registration law and Alaska's.[19/] The principal distinction between the two states' laws lay in the scope and method of notification: in Washington, the disclosing law enforcement agency needed some evidence of the offender's future dangerousness, risk of reoffense, or threat to the community to justify disclosure in a given case. *Russell,* 124 F.3d at 1082. Additionally, in Washington the police agency could disclose only information "relevant to and necessary for

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19. The only difference which the *Doe v. Otte* opinion noted between Washington's registration law and Alaska's was the frequency of registration. The *Russell* opinion did not discuss whether there was an annual reregistration requirement under the Washington law at that time. Washington's law, enacted in 1990, predated the Wetterling Act, which mandated annual updates of registration, but the Ninth Circuit in *Russell* noted it was construing the act as amended through 1996. *Russell,* 124 F.3d at 1081. In *Doe v. Otte,* the Ninth Circuit assumed that Washington required offenders to register only once unless they changed addresses. However, Alaska's law, as does Washington's today, conforms to the Wetterling requirement that offenders convicted of more serious ("aggravated") offenses, verify their addresses quarterly. (Wash. Rev. Code, §9A44.135(1)(b): sexually violent predators verify quarterly; other registrants verify addresses annually: Wash. Rev. Code, § 9A.44.135(1)(a); and see discussion *infra* at Section I). It was this quarterly verification registration requirement which the Ninth Circuit found so outrageous in *Doe v. Otte. Doe v. Otte*, 259 F.3d at 987 (quarterly reregistration "vastly more burdensome" than the registration scheme approved in *Russell v. Gregoire.*)

counteracting the offender's dangerousness," and the information could only be disseminated within a narrow geographical area. *Russell,* 124 F.3d at 1082. Additionally, the notification form used for notification about level three offenders (the most dangerous offender classification), which could be distributed to neighbors, schools, and the news media, did not contain the offender's exact address nor any information about the offender's employment. *Russell,* 124 F.3d at 1083.

Significantly, the Ninth Circuit in *Russell* analyzed the constitutional issue in part by examining this Court's opinion in *Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) ("Although we recognize that 'a civil label is not always dispositive,' we will reject the legislature's manifest intent only where a party challenging the statute provides the 'clearest proof' that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Hendricks*, 117 S.Ct. at 2082), while the Ninth Circuit panel which found the Alaska statute unconstitutional in *Doe v. Otte* virtually ignored that decision.[20/] Although the Ninth Circuit in *Doe v. Otte*, in its third and final amended version of that opinion, purported to assess the Alaska law by requiring the "clearest proof" that the statute was so punitive in purpose or effect it negated the State's intent, the Court apparently ignored this Court's admonition in *Hendricks* that to prove that a civil proceeding imposes punishment is a heavy burden. *Hendricks,* 117 S.Ct. at 2082. The *Doe v. Otte* court also overlooked this Court's statement in *Hendricks,*

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20. In *Doe v. Otte* the Ninth Circuit cited *Hendricks* for the proposition that the federal appellate court need not defer to the highest state court on whether a state statute is punitive, but relied on *Hendricks* for little else. *Doe v. Otte,* 259 F.3d at 985, n.6. However, the Alaska Supreme Court never reviewed the issue here presented, although an Alaska appellate court had found Alaska's registration and notification laws were not ex post facto. *See Patterson v. State*, 985 P.2d 1007 (Alas. App. 1999).

which was observed in *Russell,* that simply because the statute imposes an affirmative disability or restraint, and even if it imposes a sanction traditionally regarded as punishment, these features do not necessarily override the statute's nonpunitive nature. *Russell,* 124 F.3d at 1086.

Other Circuits have also held that various state laws on registration and notification did not constitute punishment for purposes of the Ex Post Facto Clause. *Moore v. Avoyelles Correc. Ctr.*, 253 F.3d 870 (5th Cir. 2001) (notification); *Burr v. Snider,* 234 F.3d 1052 (8th Cir. 2000) (registration); *Doe v. Pataki,* 120 F.3d 1263 (2d Cir. 1997) (registration and notification); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (notification); *Roe v. Office of Adult Probation,* 125 F.3d 47, 53-55 (2d Cir. 1997) (notification); *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996) (registration). In comparison, on a related issue, the Second Circuit recently held that Connecticut's sex offender registration/notification law, which disseminated information over the Internet, violated the Due Process Clause. *Doe v. Lee,* ___ F.3d ___ (3d Cir. 2001), 2001 U.S. App. Lexis 22517.

Other federal cases finding such laws not ex post facto are *Corbin v. Chitwood*, 145 F.Supp.2d 92, 99 (D.Ct. Me. 2001) (notification); *Miller v. Taft*, 151 F.Supp.2d 922 (D.Ct. Ohio 2001) (registration and notification); *Lanni v. Engler*, 994 F. Supp. 849 (D. Mich. 1998) (registration and notification); *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998) (registration; but found notification too broad); *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996) (registration and notification).

The high courts of most states which have considered the issue have upheld their states' sex offender registration and/or notification laws against ex post facto challenges. *See, e.g., State ex rel. William Olivieri v. State of Louisiana*, 779 So.2d 735 (La. 2001) (notification); *State v. Haskell*, ___ A.2d ___, 2001 Me. Lexis 157 (Me. Nov. 5, 2001) (registration); *Helman v. State,* ___ A.2d ___, 2001 Del. Lexis 477 (Nov. 7, 2001) (registration and notification); *People v. Malchow,* 739 N.E.2d 433 (Ill. 2000) (notification); *Meinders v. Weber*, 604

N.W.2d 248 (S.D. 2000) (registration); *Hensler v. Cross*, ___ S.E.2d ___ (W.Va. Dec. 7, 2001), available at www.state.wv.us/wvsca/docs/fall01/29653.htm (registration and notification); *People v. Castellanos*, 982 P.2d 211 (Cal. 1999) (registration); *Kellar v. Fayetteville Police Department*, 5 S.W.3d 402 (Ark. 1999) (notification); *Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. 1999) (registration); *Snyder v. State*, 912 P.2d 1127 (Wyo. 1996) (registration); *State v. Costello*, 643 A.2d 531 (N.H. 1994) (registration); *State v. Ward*, 869 P.2d 1062 (Wash. 1994) (registration); *State v. Noble*, 829 P.2d 1217 (Ariz. 1992); but cf. *State v. Bani*, 2001 Haw. Lexis 455 (Haw. Nov. 21, 2001) (Internet notification violates Hawaii's constitutional provision on procedural due process); *Doe v. Attorney Gen. (No. 2)*, 425 Mass. 217, 222, 680 N.E. 2d 92 (Mass. 1997) (portion of notification law held likely punitive for ex post facto double jeopardy purposes); *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (registration not punitive but notification law ex post facto).

Although respondents raised only an ex post facto challenge to Alaska's law, the issue of whether sex offender registration and notification constitute punishment is relevant in other constitutional contexts, such as under the Double Jeopardy and Due Process Clauses. See, e.g., *Hendricks*, 117 S.Ct. at 2081-2086 (Court used same test for Double Jeopardy and Ex Post Facto Clauses.) The Second Circuit recently used the intent-effects analysis to determine whether Connecticut's notification law violated the Due Process Clause, concluding the law was punitive under that test. *Doe v. Lee*, ___ F.3d ___, 2001 U.S. App. Lexis 22517. The Ninth Circuit reached the opposite conclusion in *Russell*, 124 F.3d 1079, finding Washington's registration and notification laws were not violative of due process. Thus, a decision by this Court resolving the issue in the ex post facto context may well resolve other constitutional challenges to sex offender registration and notification laws.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the petition for certiorari filed by the State of Alaska.

Dated: December 11, 2001

Respectfully submitted,

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IN THE

Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
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JOHN DOE I, JANE DOE, AND JOHN DOE II,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Relevant Docket Entries from the United States Court of Appeals for the Ninth Circuit 1

Relevant Docket Entries from the United States District Court for the District of Alaska 5

The appendix to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

A. Amended Opinion of the United States Court of Appeals for the Ninth Circuit (August 8, 2001)..... 1a

B. Initial Opinion of the United States Court of Appeals for the Ninth Circuit (April 9, 2001)..... 33a

C. Order of the United States District Court for the District of Alaska (March 31, 1999)..... 69a

D. Order of the United States District Court for the District of Alaska (August 12, 1999)..... 118a

E. Order Denying Petition for Rehearing and Petition for Rehearing En Banc (September 6, 2001)..... 123a

F. Order Denying Petition for Rehearing and Petition for Rehearing En Banc (August 23, 2001)..... 124a

The appendix to the opposition to the petition for certiorari contains the following material which is omitted from the Joint Appendix:

Transcript of Oral Argument (Excerpt), August 1, 2000 ..... 1a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-35845

JOHN DOE I, *et al.*,
Plaintiffs-Appellants,

v.

RONALD L. OTTE, *et al.*,
Defendants-Appellees.

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS
8/27/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 8/30/99; appellee's designation of RT is due 9/7/99; appellant shall order transcript by 9/17/99; court reporter shall file transcript in DC by 10/18/99; certificate of record shall be filed by 10/25/99; appellant's opening brief is due 12/6/99; appellees' brief is due 1/3/00; appellants' reply brief is due 1/18/00; [99-35845] (mhf)
12/20/99	Filed original and 15 copies of Appellant's opening brief (Informal: No) 62 pages and five excerpts of record in 1 vol; served on 12/16/99 [99-35845] (cha)

2/4/00	Filed UNDER SEAL Appellees Ronald L. Otte and Bruce M. Botelho's Suppl. Excpt in 1 vol. Served on 02/04/00. (casefile) [99-35845] (cha)
2/4/00	Filed original and 15 copies of appellee's answering brief in 65 pages brief, 5 Exc. in 1 vol UNDER SEAL; served on 1/19/00 (cha)
4/13/00	Filed original and 15 copies John Doe, Jane Doe and John Doe II's reply brief, (Informal: NO) 17 pages; served on 1/31/00 [99-35845] (sm)
8/1/00	ARGUED AND SUBMITTED TO Dorothy W. NELSON, Stephen R. REINHARDT, Sidney R. THOMAS [99-35845] (jmr)
4/9/01	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Dorothy W. NELSON; Stephen R. REINHARDT, author; Sidney R. THOMAS) FILED AND ENTERED JUDGMENT. [99-35845] (sm)
4/23/01	[4150177] Filed original and 50 copies Appellee Ronald L. Otte, Appellee Bruce M. Botelho petition for rehearing with suggestion for rehearing en banc 20 pages, served on 4/20/01. PANEL AND ALL ACTIVE JUDGES [99-35845] (gar)

4/27/01	Filed order (Stephen R. REINHARDT): Aples are directed to file a response to the aples' pet for rhrg and pet for rhrg en banc, which was filed with this ct on 4/23/01. The response is not to exceed 15 pages and is to be filed within 21 days from the date of this order. 50 copies should be filed. [99-35845] (gar)
5/17/01	Filed Appellant John Doe, Jane Doe, John Doe's response to petition opposing petition for enbanc rehearing [4150177-1] served on 5/16/01. PANEL AND ALL ACTIVE JUDGES [99-35845] (gar)
7/24/01	Filed amended opinion (Judges Dorothy W. NELSON, Stephen R. REINHARDT, Sidney R. THOMAS) (Orig. opinion id: 4/9/01 [4138519-1]) [99-35845] (gar)
8/8/01	Filed order and amended opinion (Judges Dorothy W. NELSON, Stephen R. REINHARDT, Sidney R. THOMAS) Order: The opinion filed 4/9/01 and amended on 7/24/01 is further amended as follows: Slip o. Page 9431, delete FN 10. (Orig. opinion id: [4138519-1]) [99-35845] (gar)
8/14/01	[4230647] Filed original and 50 copies Appellee Bruce M. Botelho, Appellee Ronald L. Otte petition for rehearing with suggestion for rehearing en banc 20 pages, served on 8/13/01. PANEL AND ALL ACTIVE JUDGES [99-35845] (gar)

8/23/01	Filed order (Dorothy W. NELSON, Stephen R. REINHARDT, Sidney R. THOMAS): The panel has voted to deny the pet for rhrg * * * The full ct has been advised of the pet for rhrg en banc and no active judge has requested a vote * * * Denying petition for enbanc rehearing [4230647-1] [99-35845] (gar)
8/31/01	MANDATE ISSUED with costs taxed against appellees in the amount of $261.10 [99-35845] (gar)
9/6/01	Filed order (Dorothy W. NELSON, Stephen R. REINHARDT, Sidney R. THOMAS): denying petition for enbanc rehearing [4150177-1] [99-35845] (gar)
12/3/01	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 01-729 filed on 11/21/01. [99-35845] (gar)
2/25/02	Received notice from Supreme Court, petition for certiorari GRANTED on 2/19/02. Supreme Court No. 01-729 PANEL (gar)

U.S. DISTRICT COURT
DISTRICT OF ALASKA

CIVIL DOCKET FOR CASE #: A94-206

JOHN DOE I, *et al.*,

Plaintiffs.

v.

RONALD L. OTTE, *et al.*,

Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
5/13/94	1	FLD pltf complaint, issued summons.
5/13/94	3	FLD pltf mot for prelim injunction.
6/03/94	10	FLD pltf amended complaint for prelim & perm injunction & declaratory judgment. ISSUED SUM.
6/20/94	20	FLD def's opp to mot for prelim injunction.
6/23/94	26	FLD plf's reply to opp re: prelim injunction w/att exhbs.
7/27/94	33	Fld ORDER DENYING & GRANTING in part #3, pltf's to amend complaint in own names by 8-10-94. cy cnsl.

7/10/98	95	DEF 2-3 motion for summary judgment w/att memo.
9/02/98	107-1	PLF 1-3 opposition to DEF 2-3 motion for summary judgment w/att memo (95-1).
9/02/98	107-2	PLF 1-3 motion (cross) for summary judgment (on all claims pursuant to R56).
10/15/98	111-1	DEF 2-3 opposition to PLF 1-3 motion (cross) for summary judgment (on all claims pursuant to R56 (107-2).
10/15/98	111-2	DEF 2-3 reply to opposition to DEF 2-3 motion for summary judgment (95-1).
11/09/98	113	PLF 1-3 reply to opposition to PLF 1-3 motion (cross) for summary judgment (on all claims pursuant to R56) (107-2).
3/31/99	118	HRH ORDER denying motion (cross) for summary judgment (107-2) w/leave to renew by 4/30/99; granting/denying motion for summary judgment (95-1); denying mot to file supp brief (#115); if no renewed mot fld by 4/30/99 clk shall enter judg. cc: cnsl
4/29/99	119	PLF 1-3 motion (second) for summary judgment on count X w/att memo.

5/21/99	123-1	DEF 2-3 opposition to PLF 1-3 motion (second) for summary judgment on count X (119-1).
5/21/99	123-2	DEF 2-3 memo in support of DEF 2-3 motion (second – cross) for summary judgment. (124-1)
5/21/99	124-1	DEF 2-3 motion (second – cross) for summary judgment.
6/22/99	128-1	PLF 1-3 opposition to DEF 2-3 motion (second – cross) for summary judgment. (124-1)
6/22/99	128-2	PLF 1-3 reply to opposition to PLF 1-3 motion (second) for summary judgment on count X (119-1).
7/08/99	130	DEF 2-3 reply to opposition to DEF 2-3 motion (second – cross) for summary judgment. (124-1).
8/12/99	133	(VACATED PER ORDER AT DKT 144) HRH Order denying plfs motion (second) for summary judgment on count X (119-1); granting defs motion (second – cross) for summary judgment (124-1). cc: cnsl
8/13/99	134	(VACATED PER ORDER AT DKT 144) HRH Judgment that plfs' complaint is dismissed with prejudice. cc: cnsl, O&J 10684
8/16/99	135	PLF 1-3 motion for injunction pending appeal w/att memo.

8/18/99	136	PLF 1-3 appeal to 9CCA of (134-1) filed 08/13/99. cc: cnsl, Judge Holland, 9CCA
8/23/99	139	DEF 2-3 opposition to PLF 1-3 motion for injunction pending appeal (135-1).
8/27/99	140	PLF 1[-]3 reply to opposition to PLF 1-3 motion for injunction pending appeal (135-1).
9/10/99	141	HRH Order granting motion for injunction pending appeal (135-1); court's preliminary injunction is reinstated pending disposition of plfs' appeal to 9CCA. cc: cnsl
9/04/01	143	9CCA Judgment re: notice of appeal (136-1) that the district court's decision is REVERSED AND REMANDED. cc: cnsl, Judge Holland
11/07/01	144	HRH Order re: the judgment of 8/13/99 and the court's order dated 8/12/99 ruling upon x-mots for summary judgment are both vacated. Counsel to file a status report by 12/6/01 re: further proceedings necessary to bring plfs' complaint to a conclusion. cc: cnsl
1/09/02	148	HRH final judgment granted in favor of plfs & against defs; plfs are prevailing party. cc: cnsl, O&J 11288

Supreme Court, U.S.
FILED
JUN 3
JUN 3 2002
CLERK

No. 01-729

IN THE
Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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88 pages

QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. §§ 12.63.010 *et seq.*, requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The Department elected to publish the information on the Internet. Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the Ex Post Facto Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners Glenn G. Godfrey (successor to Ronald O. Otte) and Bruce M. Botelho are, respectively, the Alaska Commissioner of Public Safety and the Alaska Attorney General. Otte and Botelho were defendants in the District Court and appellees before the Court of Appeals for the Ninth Circuit. Respondents John Doe I, Jane Doe, and John Doe II were plaintiffs in the District Court and appellants before the Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

No. 01-729

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit, as amended, is reported at 259 F.3d 979 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The original opinion is reprinted at Pet. App. 33a. The opinions and orders of the United States District Court for the District of Alaska dated March 31, 1999, and August 12, 1999, are not reported; they are reproduced at Pet. App. 69a and 118a, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered on August 8, 2001. The Ninth Circuit denied petitions for rehearing and for rehearing en banc on August 23, 2001, and September 6, 2001. Pet. App. 124a, 123a. The petition for certiorari was

filed on November 21, 2001, and granted on February 19, 2002. 122 S. Ct. 1062. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, section 10 of the United States Constitution provides, in pertinent part: "No State shall * * * pass any * * * ex post facto Law."

The Alaska Sex Offender Registration Act, Alaska Stat. §§ 12.63.010-.100 and § 18.65.087, and pertinent regulatory provisions, are reprinted in the addendum hereto.

INTRODUCTION

The Alaska Sex Offender Registration Act ("ASORA") was enacted to protect the public and to assist law enforcement in investigating future crimes. It requires state law enforcement entities to gather truthful information about sex offenders and to make certain of that information available to the public. The State has chosen to make such information available on the Internet. Like all other courts to have considered sex offender registration laws, the Ninth Circuit concluded that the legislature acted with non-punitive intent when it passed the ASORA. The court of appeals erroneously departed from the overwhelming majority of courts, however, in holding that the ASORA was nonetheless so punitive in effect that it violated the Ex Post Facto Clause.

We are aware of no case in which this Court has held that a law had a non-punitive intent and yet nonetheless violated the Ex Post Facto Clause. Nor has this Court ever held that regulatory requirements like those imposed on sex offenders by the ASORA amount to punishment; indeed, it has countenanced far more onerous burdens imposed by non-punitive regulatory statutes. The Ninth Circuit's decision should be reversed.

STATEMENT OF THE CASE

Statutory Background. 1. In 1994, after a series of sexual crimes against children committed by prior offenders made news across the country, Congress passed the Jacob Wetterling Crimes Against Children and Law Enforcement Act, 42 U.S.C. §§ 14071 *et seq.* The Wetterling Act directs the Attorney General to develop guidelines for state sex offender registration programs, *id.* § 14071(a), specifies registration requirements for individuals convicted of certain sex offenses and the duration of those requirements, and permits States to release registry information "to protect the public concerning a specific person required to register under [the Act]." *Id.* § 14071(e)(2). The Wetterling Act encourages States to adopt registration programs that conform to or exceed its terms by conditioning receipt of certain federal funds on the implementation of such programs. *Id.* § 14071(g)(2). In 1996, Congress amended the Wetterling Act to provide that offenders convicted of one "aggravated sex offense" or two or more triggering offenses be required to register for life, and to permit States to disclose registry information "for any purpose permitted under the laws of the State." *Id.* §§ 14071(b)(6), (e) (Supp. III 1997).

Today, all fifty States and the District of Columbia have sex offender registration and notification statutes on their books.[1] Approximately thirty States and the District of Col-

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[1] *See* Ala. Code §§ 13A-11-200, 15-20-21(1), 15-20-25(b) (2001); Alaska Stat. §§ 12.63.010-.100, 18.65.087 (2001); Ariz. Rev. Stat. §§ 13-3821 *et seq.* (2001 & Supp. 2002); Ark. Code Ann. §§ 12-12-901 *et seq.* (West 2001); Cal. Penal Code §§ 290 *et seq.* (West 1999 & Supp. 2002); Colo. Rev. Stat. § 18-3-412.5 (1999 & Supp. 2002); Conn. Gen. Stat. §§ 54-250 *et seq.* (2001); Del. Code Ann. tit. 11, §§ 4120, 4121, 4336 (2001 & Supp. 2002); D.C. Code Ann. §§ 22-4001 *et seq.* (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1) (West 2001); Ga. Code Ann. § 42-9-44.1 (2001); Haw. Rev. Stat. §§ 846E-1 *et seq.* (2001); Idaho Code §§ 18-8301 *et seq.* (2001 & Supp. 2002); 730 Ill. Comp. Stat.

umbia make their registries available on the Internet. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Summary of State Sex Offender Registries, 2001* (2002) (noting that "a growing number of States use[] the Internet to fulfill notification requirements under Megan's Law"); http://www.meganslaw.org (collecting Internet sex offender registries).[2]

The rapid development of state sex offender statutes has led to a spate of lawsuits challenging their terms. A central question presented by many of those lawsuits is whether sex offender registration and notification constitute retroactive punishment prohibited by the Constitution's Ex Post Facto Clause. The overwhelming majority of courts have answered that question in the negative. *See infra* n.11.

2. The State of Alaska became the thirty-second State to enact a sex offender registration law when, in 1994, its legislature enacted the ASORA. The ASORA requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of certain information in the sex offender registry. Alaska Stat. §§ 12.63.010, 18.65.087.

The ASORA was enacted "at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a 'crisis.' " Pet. App. 6a. The State's legislature heard testimony that the rate of child sexual abuse in Alaska was the highest in the Nation—indeed, more than six times the national average. *See Minutes of Hearing Before Senate Judiciary Comm.* ("*Senate Judiciary Hearing*"), 18th Alaska Legis., 1st Sess. 9 (Apr. 14, 1993) (No. 505); *Minutes of Hearing Before Senate Finance Comm.* ("*Senate Finance Hearing*"), 18th Alaska Legis., 1st Sess. 3 (Apr. 28, 1993). The State's sexual assault rate in 1993 was the second

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§§ 150/1 *et seq.* (1997 & Supp. 2002); Ind. Code §§ 5-2-12-1 *et seq.* (West 2001 & Supp. 2002); Iowa Code Ann. §§ 692A.1 *et seq.* (West 2002); Kan. Stat. Ann. §§ 22-4901 *et seq.* (2001); Ky. Rev. Stat. Ann. §§ 17.500 *et seq.* (West 2001); La. Rev. Stat. Ann. §§ 15:540 *et seq.* (West 2001 & Supp. 2002); Me. Rev. Stat. Ann. tit. 34-A, §§ 11201 *et seq.* (West 2001 & Supp. 2002); Md. Ann. Code §§ 11-701 *et seq.* (2001 & Supp. 2002); Mass. Gen. Laws ch. 6, §§ 178C-178P (2002); Mich. Comp. Laws Ann. §§ 28.721 *et seq.* (West 2002); Minn. Stat. §§ 243.166, 244.052 (1992 & Supp. 2002); Miss. Code Ann. §§ 45-33-21 *et seq.* (2001); Mo. Rev. Stat. §§ 589.400 *et seq.* (West 2002); Mont. Code Ann. §§ 46-23-501 *et seq.* (2001); Neb. Rev. Stat. §§ 29-4001 *et seq.* (2001); Nev. Rev. Stat. §§ 179D.350 *et seq.* (2001); N.H. Rev. Stat. Ann. § 651-B (2001); N.J. Stat. Ann. § 2C:7 (1995 & Supp. 2002); N.M. Stat. Ann. § 29-11A (Michie 2000); N.Y. Correct. Law § 168 (McKinney 2001 & Supp. 2002); N.C. Gen. Stat. §§ 14-208.5-208.31 (2001); N.D. Cent. Code § 12.1-32-15 (2001); Ohio Rev. Code Ann. §§ 2950.01 *et seq.* (West 2001); Okla. Stat. Ann. tit. 57, §§ 581 *et seq.* (West 1991 & Supp. 2002); Or. Rev. Stat. §§ 181.585 *et seq.* (2001); 42 Pa. Cons. Stat. Ann. §§ 9791 *et seq.* (West 1998 & Supp. 2002); R.I. Gen. Laws § 11-37.1 (2001); S.C. Code Ann. §§ 23-3-400 *et seq.* (2002); S.D. Codified Laws §§ 22-22-30 *et seq.* (Michie 2001 & Supp. 2002); Tenn. Code Ann. §§ 40-39-101 *et seq.* (2001 & Supp. 2002); Tex. Crim. Proc. Code Ann. §§ 62.01 *et seq.* (Vernon 2001); Utah Code Ann. § 77-27-21.5 (2001 & Supp. 2002); Vt. Stat. Ann. tit. 13, §§ 5401 *et seq.* (2001); Va. Code Ann. §§ 19.2-298.1 *et seq.*, -390.1 (Michie 2002); Wash. Rev. Code Ann. §§ 9A.44.130 *et seq.*, §§ 4.24.550 *et seq.*, § 4.24.5501 (2001 & Supp. 2002); W. Va. Code §§ 15-12-1 *et seq.* (2001); Wis. Stat. Ann. §§ 301.45 *et seq.* (West 2001 & Supp. 2002); Wyo. Stat. Ann. §§ 7-19-301 *et seq.* (Michie 2000).

[2] Such laws are often called "Megan's Laws," after Megan Kanka, a seven-year-old New Jersey child who was sexually assaulted and murdered by a neighbor who—unbeknownst to the Kanka family—had two prior convictions for sexual offenses against children. *See* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1172 (1999).

highest in the Nation and had nearly doubled in the prior two years. *See Senate Judiciary Hearing* at 9, 13 (Nos. 505, 209); *Minutes of Hearing Before House Judiciary Comm.* ("*House Judiciary Hearing*"), 18th Alaska Legis., 1st Sess. 17 (Feb. 10, 1993) (No. 000). Legislators also heard testimony that about a quarter of Alaska's entire prison population was incarcerated for sexual offenses, and that studies had shown that sex offenders had high rates of recidivism. *See Minutes of Hearing Before House Finance Comm.* ("*House Finance Hearing*"), 18th Alaska Legis., 1st Sess. 7 (Mar. 3, 1993); *Senate Judiciary Hearing* at 9 (No. 505); *House Judiciary Hearing* at 9 (No. 612).

When it enacted the ASORA, the legislature stated its conclusions that:

> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety. [1994 Alaska Sess. Laws ch. 41, § 1.]

The ASORA requires people convicted of a "sex offense" or "child kidnapping"—as defined by the statute—who are physically present in the State of Alaska to register with the Department of Corrections if they are incarcerated, or with their local state trooper post or police department if they are at liberty. Alaska Stat. § 12.63.010(b).[3] A person required to

[3] Those convicted before July 1, 1984 of one sex offense or child kidnapping do not have to register under the ASORA. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a); 1998 Alaska Sess. Laws ch. 106, § 25(a).

register under the ASORA must provide various information, including his name, address, place of employment, and information about vehicles to which he has access. He must also allow the police department to take a photograph and a set of fingerprints. *Id.* §§ 12.63.010(b)(1)-(2).

The Act requires offenders covered by its terms to notify their local police department when they change addresses. *Id.* § 12.63.010(c); *see* 13 Alaska Admin. Code § 09.040. Offenders convicted of an "aggravated sex offense" or of two or more sex offenses are further required to provide quarterly "written verification" to their local police department of their current address and of any changes to their registry information, for the rest of their lives. Alaska Stat. §§ 12.63.010(d)(2), 12.63.020(a). Those convicted of one non-aggravated offense covered by the Act must provide annual "written verification" of their current address and of any changes to their registry information, for fifteen years. *Id.* § 12.63.010(d)(1). *See also* 13 Alaska Admin. Code § 09.025(d)-(e) (detailing procedures for receiving written submissions from registrants).[4] Registrants may request the Department of Public Safety to correct or review information maintained in the registry and may appeal adverse responses to the Commissioner of Public Safety. *Id.* § 09.060. A person who knowingly fails to register, to file an address change notice, or to file the required annual or quarterly written statement is subject to criminal prosecution. *See* Alaska Stat. §§ 11.56.835, 11.56.840.

[4] The Department of Public Safety may instruct an offender to appear in person to be photographed if five or more years have passed since a registration photograph was taken or there is reason to believe an offender's appearance has changed significantly. *Id.* § 09.030(b).

The ASORA designates most registration information as "nonconfidential" and requires that the State's Department of Public Safety make nonconfidential information available to the public. *See* Alaska Stat. § 18.65.087.[5] Until June 1997, the Alaska state troopers maintained a complete list of the State's registered sex offenders at each trooper post. Anyone who wished to could look at the list at the state trooper post, purchase a complete list of registered sex offenders, or request that a specific search be conducted. In June 1997, the Department of Public Safety made the sex offender registry available on the Internet. Pet. App. 73a.[6] The site displays a prominent warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution." Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry* (http://www.dps.state.ak.us/nSorcr/asp/). Alaska, like some twenty other States, *see infra* n.27, takes a categorical approach to notification; the State does not individually assess the risk of recidivism posed by each registered sex

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[5] The following information provided by the registrant is kept confidential: fingerprints, driver's license number, anticipated changes of address, whether the registrant has been unconditionally discharged from the conviction, the date of the unconditional discharge, and whether the registrant has had treatment for a mental abnormality or personality disorder since the date of the conviction. *Id.* §§ 12.63.010(b), 18.65.087(b).

[6] The ASORA does not specify the means of making registry information public, and the regulations simply state that such information be provided "by posting or otherwise making it available for public viewing in printed or electronic form." Alaska Admin. Code § 09.050(a). The statute allows public access to information regarding motor vehicles to which the registrant has access and to information about the length and conditions of the registrant's sentence, but the Department of Public Safety does not post this information on the Internet. *Compare* Alaska Stat. § 18.65.087(b) *with* http://www.dps.state.ak.us/nSorcr/asp/.

offender before posting registry information on the Department of Public Safety website.

Facts. Respondent John Doe I was charged with three counts of first-degree sexual abuse of a minor. Ct. App. Sealed E.R. 113. He pled nolo contendere to one count of first-degree and one count of second-degree sexual abuse of a minor and was sentenced to twelve years' imprisonment, four years of which were suspended. *Id.* at 113-114. John Doe I was released from prison in December 1990. *Id.* at 114. He married respondent Jane Doe after his release from prison. *Id.* at 115. Respondent John Doe II was charged with first-degree sexual abuse of a minor. *Id.* at 126. He pled nolo contendere to one count and was sentenced to eight years' imprisonment. *Id.* John Doe II was released from prison in May 1990. *Id.*

John Doe I and John Doe II were required to register as sex offenders under the ASORA because they were convicted after July 1, 1984 of offenses triggering application of the statute. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a). Because both were convicted of an "aggravated sex offense," *see* Alaska Stat. § 12.63.100(1), the Act required both to provide, on a quarterly basis, "written verification" of their current address and notice of any changes to their registry information. *See id.* §§ 12.63.010(d)(2), 12.63.020; 1998 Alaska Sess. Laws ch. 106, § 25 (new registration requirements for aggravated sex offenses apply retroactively).

Proceedings Below. 1. The Does sued petitioners—the state Commissioner of Public Safety and the state Attorney General—under 42 U.S.C. § 1983, claiming, *inter alia*, that the ASORA was an ex post facto law. Ruling on summary judgment, the District Court explained that the ex post facto issue turned on "whether the registration and/or notification provisions of ASORA constitute punishment." Pet. App. 76a. To answer that question, the court applied the two-step "intent-effects" test. *See Kansas* v. *Hendricks*, 521 U.S. 346,

361 (1997) (describing test); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980) (same). The District Court concluded that the legislature's intent was regulatory, not punitive, and that in particular the "legislative findings make plain that the 'release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety' "—clearly a non-punitive objective. Pet. App. 91a (quoting 1994 Alaska Sess. Laws ch. 41, § 1).

Turning to the effects prong, the court explained that plaintiffs were required to demonstrate by the "clearest proof" that despite the legislature's regulatory intent, the statutory requirements were "so punitive in effect as to prevent the court from viewing [them] as regulatory or civil in nature." *Id.* at 85a, 77a (quotation omitted). Reviewing several considerations set forth by this Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the District Court concluded that the plaintiffs had not satisfied that heavy burden. Pet. App. 90a, 94a, 99a. Plaintiffs appealed.

2. The Ninth Circuit reversed. On the first step of the inquiry the panel found that the legislature sent "conflicting signals" about its intent. Pet. App. 42a. Acknowledging that the legislature's express findings indicated that the Act had "a non-punitive purpose—protection of the public through the collection and release of information"—the court found those findings "by no means conclusive," stating that the "structure and design of the Alaska Act" supported the conclusion "that the legislature intended that the statute be punitive." *Id.* at 45a-46a.

Turning to the "effects" prong of the ex post facto inquiry, the Ninth Circuit recognized that "[w]hen a legislature plainly states its intent that a statute is *not* punitive, courts must 'reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention.' " *Id.* at 46a (quoting *Hendricks*, 521 U.S. at 361) (emphasis in original). The court held, however, that it would not employ that strict standard in this case but would instead apply only "ordinary and customary legal standards" in examining the statute's effect, because the legislature's intent was "unclear." *Id.* at 47a.[7]

The Ninth Circuit found the Act punitive in effect. Applying the seven *Mendoza-Martinez* "factors," *see* 372 U.S. at 168-169, the court concluded that three factors weighed against, and four in favor of, finding the Act punitive. The court recognized that sex offender registration and notification statutes "have not historically been regarded as punishment." Pet. App. 65a. The Ninth Circuit also recognized that the Act's provisions did not take effect only on a finding of scienter, which likewise weighed against finding the statute punitive. *Id.* at 53a-54a. And the Ninth Circuit acknowledged that the Act undoubtedly had the "alternative non-punitive purpose" of "public safety, which is advanced by alerting the public to the risk of sex offenders in their communities." *Id.* at 58a-59a. The court found that non-punitive purpose to "unquestionably provide[] support, indeed the principal support, for the view that the statute is not punitive." *Id.* at 59a.

The court, however, found four *Mendoza-Martinez* considerations to weigh in favor of finding the statute punitive. First, it concluded that the ASORA "imposed an affirmative

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[7] *See also id.* at 48a n.8 ("in *Russell* [v. *Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998),] we required a showing of the 'clearest proof' because we determined that the legislature's manifest intent was that the statute not be deemed punitive, while here, because the legislative intent is unclear, we do not apply so burdensome a standard"); *id.* at 52a (noting that "the standard of proof we apply here is different than in [*Russell*]"); *id.* at 59a n.12 (again distinguishing the standard applied in *Russell*); *id.* at 61a n.14 (distinguishing "clearest proof" standard applied by the Tenth Circuit in *Femedeer* v. *Haun*, 227 F.3d 1244 (10th Cir. 2000)).

disability on the plaintiffs." *Id.* at 48a. The court viewed the Act as requiring plaintiffs and others convicted of aggravated sex offenses to "appear in person at a police station" four times each year to verify their information, which the court concluded was so "onerous" a requirement as to constitute an affirmative disability. *Id.* at 48a-49a.

The Act's notification provisions also imposed an "affirmative disability," the panel held, because "by posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally" and may "make the plaintiffs *completely* unemployable." *Id.* at 49a-50a (emphasis in original). Emphasizing again that the "standard of proof we apply here is different" than the exacting "clearest proof" standard, the court found that "[c]onsidered as a whole, the Alaska statute's registration and notification provisions[] impose a significant disability on the plaintiffs," and thus "clearly favor[] treating the Act as punitive." *Id.* at 52a.

The court found that another *Mendoza-Martinez* consideration, whether the statute promotes the "traditional aims of punishment—retribution and deterrence," also weighed "on the side of finding the Act punitive." *Id.* at 54a. The Act's registration obligations—which, the court reiterated, imposed on those convicted of aggravated sex offenses a "duty * * * to report quarterly to their local police stations"—appeared to the court to be "inherently retributive." *Id.* at 55a. The duration of the reporting requirements—and the fact that they were tolled in years of noncompliance—also gave the court pause. In its view, "requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years)" exacted an additional penalty. *Id.* at 56a. The Act thus "appears to further the fundamental aims of punishment" and its requirements "suggest that they serve as retribution." *Id.* at 57a.

The court next concluded that because the Act "applies only to behavior that is already criminal," that weighed in favor of finding the statute punitive. *Id.* at 57a. Finally, the Ninth Circuit concluded that the ASORA "appears excessive in relation to [its] alternative purpose" of protecting the public. *Id.* at 59a (quotation omitted). The statute was "exceedingly broad," the court concluded, because it was not "limited to those who the state determines pose a future risk to the community;" rather, all sex offenders convicted after July 1984, no matter the risk they posed, were listed on the registry. *Id.* at 63a, 60a. Emphasizing again that the statute "forced" even a "successfully rehabilitated" offender "to submit to in-person registration at his local police department four times a year, every year," the court of appeals found that the ASORA's "unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense" weighed "strongly in favor of a determination that its effect is punitive." *Id.* at 63a.

Weighing "all the *Mendoza-Martinez* factors together," under the "ordinary" standard of review it had held applicable, the court concluded, "on balance, * * * the effect of the Alaska statute is punitive." *Id.* at 66a. It accordingly found that the statute's application to John Doe I and John Doe II violated the Ex Post Facto Clause. *Id.*

3. The State sought rehearing and rehearing en banc. It challenged the panel's conclusion that the legislature's intent in enacting the ASORA was ambiguous, pointing out that Alaska's Act closely followed the structure and design of the Washington State sex offender law the Ninth Circuit had upheld in *Russell*. The State also pointed out that a critical factual error had permeated the panel's decision: *no one* was required to re-register "in person" at local police stations under the Act, as the opinion (six times) stated; registrants need only submit quarterly or yearly "written verification" of their information. Alaska Stat. § 12.63.010(d).

Without ruling on the petition for rehearing, the panel issued an amended opinion. Pet. App. 1a. The panel's amended decision made a U-turn from its initial conclusion on legislative intent: where it had once found the legislature's intent ambiguous, the panel now agreed that the Alaska statute was "remarkably similar" in structure to the Washington statute it had upheld in *Russell*, and it held that "the legislature acted with a non-punitive intent" when it passed the Alaska Act. *Id.* at 11a; *see id.* at 12a.

This meant that the court's analysis of the effect of the statute became subject to the "clearest proof" standard, and the court recognized as much. *Id.* at 12a-13a. But the panel simply reinstated almost *verbatim* its earlier analysis of the effect of the ASORA—except for deleting its earlier repeated statements to the effect that the "standard of proof we apply here is different" than the "clearest proof" standard.[8] Thus,

[8] The alterations in the amended opinion are telling. For example, the court initially concluded that the Act "*appears to* further the fundamental aims of punishment," and that its requirements "*suggest* that they serve as retribution," Pet. App. 57a (emphases added); the amended decision states that the Act affirmatively *did* "further[] the fundamental aims of punishment" and that the requirements "*show* that they serve • • • as retribution." *Id.* at 21a (emphasis added). *Compare also* Pet. App. 64a (original) ("the *Mendoza-Martinez* test leads us to hold that the Act's effect is sufficiently punitive that notwithstanding the legislature's ambiguous intent, the Alaska statute should be classified as punitive") *with id.* at 28a (amended) ("the *Mendoza-Martinez* test leads us to hold that the effects of the specific provisions of the Alaska Act provide the 'clearest proof' that, notwithstanding the legislature's non-punitive intent, the statute must be classified as punitive"); *and id.* at 66a (original) ("When we weigh all the *Mendoza-Martinez* factors together, we conclude, on balance, that for purposes of the Ex Post Facto Clause, the effect of the Alaska statute is punitive") *with id.* at 30a (amended) ("[W]eighing all of the *Mendoza-Martinez* factors together, the effects of the Act provide the clearest proof that it is punitive").

whereas the panel had initially found that various factors indicated a punitive purpose and effect under "ordinary" standards of review, it now found that those *same* factors provided the "clearest proof" of the law's punitive nature.

The panel also held fast to its conclusion that the ASORA required offenders to re-register "in person" at police stations quarterly or annually—despite the plain language of the statute permitting "written verification" of information. *See id.* at 7a. In a new footnote, the court opined that the statute "on its face, does not clearly specify that these registrations must be made in person at local police stations," but stated that "the government represented at oral argument that periodic in-person registration at local police stations is required by the Act." *Id.* at 7a n.4.

The State again sought rehearing en banc. The court of appeals denied both the original petition for rehearing and the petition for rehearing from its amended opinion. Pet. App. 123a-124a. This Court granted certiorari. 122 S. Ct. 1062 (2002).

SUMMARY OF ARGUMENT

The ASORA is a regulatory law intended to help protect the public from future harm by collecting truthful information and making it available to those who choose to access it. It is not a penal law intended to punish people for past acts. To determine whether a law is penal within the meaning of the Ex Post Facto Clause, the Court employs a two-step test. First, the Court asks whether the legislature intended that the law serve legitimate regulatory purposes, rather than punitive ones. If so, the inquiry is at an end, except in extremely limited circumstances where the party challenging the law carries the "heavy burden" of showing by the "clearest proof" that the stated intent is merely a charade for punitive goals. *Hendricks*, 521 U.S. at 361.

This "clearest proof" requirement exists not only because of the inherent difficulties in ascertaining legislative intent other than through the statutory language itself, but also because of the purposes of the Ex Post Facto Clause. The Ex Post Facto Clause protects against vindictive or malicious legislation, an inquiry that necessarily turns on the intent of the legislature. Precisely the same sanction can be either civil or penal depending on the legislature's intent. Thus, once it is determined that the legislature's intent was not punitive, the ex post facto inquiry is all but over. Other constitutional provisions, such as the Due Process Clause, protect against legislation that is irrational or does not sufficiently serve its stated purposes.

As every court to have considered the issue (including the Ninth Circuit below) has held, the intent behind sexual offender registration and notification statutes is regulatory, not punitive. As the Alaska legislature expressly declared, the ASORA was intended to "protect[ ] the public" and "protect[ ] the public safety," by collecting and making available truthful information that people may find useful to safeguard themselves and their children from possible *future* harm. 1994 Alaska Sess. Laws ch. 41, § 1. The law was not intended to punish people for *past* acts, and in fact imposes only minimal regulatory requirements on those required to register. The legislative history confirms this express non-punitive intent.

The ex post facto inquiry is therefore over unless there is the clearest proof that the legislature's expressed intent masks a true punitive purpose. To locate such proof, the Court has traditionally looked to the factors set forth in *Mendoza-Martinez* as guideposts. Demonstrating the narrowness of that inquiry, however, the Court has never held that a law had a non-punitive purpose but nevertheless violated the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors. Indeed, the Court has routinely upheld the

retroactive application of laws far more onerous than the ASORA.

Contrary to the Ninth Circuit's holding, there is no proof, much less the required clearest proof, that the ASORA is so punitive in purpose or effect so as to negate the legislature's finding to the contrary. The Ninth Circuit correctly held that three *Mendoza-Martinez* factors indicated that the law is not punitive. *First*, registration and notification provisions have not historically been regarded as punishment. Registration requirements are commonplace in our regulated society, and provisions that make information about criminal records available to the public are likewise common and have never been considered additional punishment for the underlying crime. *Second*, the ASORA does not come into play only upon a finding of scienter. To the contrary, the law's provisions are triggered only by the fact of a conviction. *Third*, the law plainly has a non-punitive purpose that can rationally be assigned to it—protecting the public from future harm.

The Ninth Circuit erred, however, in concluding that the four other *Mendoza-Martinez* factors so outweighed the others and the legislature's intent as to render the ASORA punitive in fact. *First*, the ASORA imposes no affirmative disability or restraint. The registration and verification requirements are undemanding and, contrary to the Ninth Circuit, do not require that quarterly verifications be submitted in person. The notification provisions likewise impose no affirmative disability or restraint. Although notification could conceivably have negative collateral effects due to the actions of those who learn the information, those consequences accompany any disclosure of criminal records and are not an affirmative disability or restraint imposed by the law. *Second*, the ASORA does not further the traditional aims of punishment. It is not inherently retributive to collect truthful information and make it available to those who choose to access it as a means of safeguarding themselves and their families. And even if the law were seen as a

deterrent, the Court has long held that deterrence is a civil, not simply punitive, goal. *Third*, while the ASORA applies only to behavior that is already criminal, that factor should be of little import in the ex post facto inquiry, and the Court has never held a law punitive simply because it applies to convicted felons. *Finally*, the ASORA is not excessive in comparison to its regulatory purposes, particularly when compared to far more onerous laws the Court has upheld in the past. Ex post facto analysis does not require a perfect fit between means and ends, and such inquiries are in any event better left to a due process analysis.

ARGUMENT

I. THE ALASKA LEGISLATURE EXPRESSLY INTENDED THAT THE ASORA SERVE REGULATORY, NOT PUNITIVE, GOALS.

A. The Court Should Defer To The Legislature's Intent To Further Civil Goals Absent The "Clearest Proof" Of Punitive Intent.

The Ex Post Facto Clause provides that "[n]o State shall * * * pass any * * * ex post facto Law." U.S. Const. art. I, § 10, cl. 1. *See also id.* art. I, § 9, cl. 3. Since the early days of the Republic, it has been clear that this clause applies only to criminal punishments. It prohibits the retroactive application of a law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis removed). Thus, for a law to violate the Ex Post Facto Clause, it must impose "punishment," rather than a regulatory burden or civil sanction. *See, e.g., De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts."); *Trop* v. *Dulles*, 356 U.S. 86, 95-96 (1958) ("Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a

penal law was involved, because these provisions apply only to statutes imposing penalties.") (plurality).

In determining whether a law is penal for purposes of the Ex Post Facto Clause, the Court engages in a two-step inquiry. *See, e.g., Hudson* v. *United States*, 522 U.S. 93, 99 (1997); *Hendricks*, 521 U.S. at 361; *United States* v. *Ursery*, 518 U.S. 267, 277-278 (1996).[9] Categorization of a law as civil or criminal " 'is first of all a question of statutory construction.' " *Hendricks*, 521 U.S. at 361 (quoting *Allen*, 478 U.S. at 368). *See also Ward*, 448 U.S. at 248-249 ("[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction."). Thus, in the first step, the Court "must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Hendricks*, 521 U.S. at 361. This inquiry asks whether the legislature "indicated either expressly or impliedly a preference" for a civil or criminal label. *Ward*, 448 U.S. at 248.

Under the second step in the analysis, if the legislature has indicated an intent to establish a civil sanction, the Court will "ordinarily defer to the legislature's stated intent," and "will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' "

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[9] The same general test for determining whether a law constitutes punishment applies to various other provisions of the Constitution, in addition to the Ex Post Facto Clause—including the Double Jeopardy Clause, *see, e.g., Hendricks*, 521 U.S. at 360-369, the Bill of Attainder Clause, *see, e.g., De Veau*, 363 U.S. at 160, the Self-Incrimination Clause of the Fifth Amendment, *see, e.g., Allen* v. *Illinois*, 478 U.S. 364, 368-369 (1986), and the protections afforded by the Sixth Amendment, *see, e.g., Ward*, 448 U.S. at 248. Various factors employed by the Court in the second step of the analysis may be more relevant to some constitutional provisions than others. *See infra* at 44-45.

Hendricks, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-249). *See Helwig* v. *United States*, 188 U.S. 605, 613 (1903) ("If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will.").

The Court will look for that "clearest proof" by examining various factors, catalogued by the Court in *Mendoza-Martinez*. *See* 372 U.S. at 168-169. These factors must be "considered in relation to the statute on its face," *id.* at 169, and "no one factor should be considered controlling as they 'may often point in differing directions.' " *Hudson*, 522 U.S. at 101 (quoting *Mendoza-Martinez*, 372 U.S. at 169).

As the Court has made clear, however, such "clearest proof" will exist only in "limited circumstances," and a party bears a "heavy burden" when attempting to override the legislature's expressed intent. *Hendricks*, 521 U.S. at 361. The reason for this deference is in part due to the usual strong presumption of constitutionality afforded to legislation, as well as the hazards of attempting to discern a legislature's true motive other than through the express words of the statute. As the Court held when it first formulated the "clearest proof" requirement:

> Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. [*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).]

The near-controlling weight given to the legislature's stated intent is also linked to the purposes of the Ex Post Facto Clause and related constitutional provisions that protect against, or provide procedural safeguards for, the imposition of punishment. For example, the Ex Post Facto Clause, and

its neighbor the Bill of Attainder Clause, were intended to protect against penal laws "stimulated by ambition, or personal resentment, and vindictive malice." *Calder*, 3 U.S. at 389. Thus, the Ex Post Facto Clause protects against vindictive, malicious legislation, a characterization that necessarily depends on the evident *intent* of the legislation, not its effects. That is why "[i]n deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute." *Trop*, 356 U.S. at 96 (plurality).

As the Court has noted, divorcing the inquiry from the legislature's purpose would be a futile exercise. "The Court has recognized that *any* statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect," and it is for this reason that "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id.* (emphasis supplied). Because the effect of the sanction says little, if anything, about its punitive or non-punitive quality, *see*, *e.g.*, *Flemming*, 363 U.S. at 616 n.9 ("the severity of a sanction is not determinative of its character as 'punishment' "), whether a law impermissibly inflicts punishment, rather than some other form of hardship, depends on the intent of the lawmaker, not the nature of the hardship. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' " *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994) (citations omitted). For example, even indefinite confinement—often a penal sanction—can also serve civil goals. *See Hendricks*, *supra*; *Allen*, *supra*.

For these reasons, "a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." *Trop*, 356 U.S. at 96 (plurality). Once it is evident that the legislature has such a legitimate non-penal, regulatory purpose, *other* constitutional provisions protect against laws that do not

legitimately serve their stated purposes, or are otherwise beyond the legislature's power. *Hudson*, 522 U.S. at 102-103. For example, the Due Process and Equal Protection Clauses protect against sanctions that are "downright irrational," and the Eighth Amendment protects against excessive civil fines. *Id.* at 103. The Due Process Clause also provides procedural protections where (unlike here) a law deprives a person of a liberty or property interest.[10] The Ex Post Facto Clause is not a substitute for these other provisions of the Constitution, and should not—through expansive application of wide-ranging, multi-factor inquiries—be made to serve the offices of other safeguards.

In sum, precisely the same sanction can serve a civil or punitive goal depending on the purposes intended by the legislature. Thus, once it is determined that the legislature intended a civil goal, the ex post facto inquiry is at an end—except in those truly exceptional circumstances where there is the clearest proof that the legislature's expressed purpose is just a charade for punitive goals. *See Flemming*, 363 U.S. at 619 (legislature's expressed civil intent controlling in absence of "unmistakable evidence of punitive intent"). This case does not present such an exceptional situation. The intent of the Alaska legislature was expressly to create a civil, regulatory scheme to protect the public. And there is no proof—much less the clearest proof—that its intent was a sham so as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 154 (1956).

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[10] The Court recently granted certiorari in another case to determine whether a sex offender registration and notification statute violates the Due Process Clause. *See Connecticut Dep't of Pub. Safety* v. *Doe*, No. 01-1231 (cert. granted May 20, 2002).

B. In Enacting The ASORA, The Legislature Expressly Declared A Valid Regulatory Purpose.

Every court to have considered an ex post facto challenge to a sexual offender registration and notification law—including the Ninth Circuit in this case—has concluded that the laws were intended to serve valid regulatory, rather than punitive purposes.[11] As the Ninth Circuit held, "the legisla-

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[11] *See, e.g.*, Pet. App. 11a-12a; *Doe* v. *Department of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001), *cert. granted*, No. 01-1231 (U.S. May 20, 2002); *Moore* v. *Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir.), *cert. denied*, 122 S. Ct. 492 (2001); *Burr* v. *Snider*, 234 F.3d 1052 (8th Cir. 2000), *cert. denied*, 122 S. Ct. 105 (2001); *Femedeer*, 227 F.3d at 1249; *Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Roe* v. *Office of Adult Prob.*, 125 F.3d 47, 53-54 (2d Cir. 1997); *Russell* v. *Gregoire*, 124 F.3d at 1087-88; *Doe* v. *Pataki*, 120 F.3d 1263, 1276-78 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); *E.B.* v. *Verniero*, 119 F.3d 1077, 1096-97 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109-10 (1998); *Hyatt* v. *Commonwealth*, __ S.W.3d __, 2002 WL 337071, at *4 (Ky. 2002); *State* v. *Walls*, 558 S.E.2d 524, 526 (S.C. 2002); *State* v. *Kelly*, 770 A.2d 908, 952-954 (Conn. 2001); *Helman* v. *State*, 784 A.2d 1058, 1077 (Del. 2001); *State* v. *Haskell*, 784 A.2d 4, 10 (Me. 2001); *State ex rel. Oliveri* v. *State*, 779 So. 2d 735, 747 (La.), *cert. denied*, 533 U.S. 936 (2001); *Hensler* v. *Cross*, 558 S.E.2d 330, 335 (W. Va. 2001); *People* v. *Malchow*, 739 N.E.2d 433, 438 (Ill. 2000); *Meinders* v. *Weber*, 604 N.W.2d 248, 255 (S.D. 2000); *Patterson* v. *State*, 985 P.2d 1007, 1012-13 (Alaska Ct. App. 1999); *Kellar* v. *Fayetteville Police Dep't*, 5 S.W.3d 402, 407 (Ark. 1999); *People* v. *Castellanos*, 982 P.2d 211, 217 (Cal. 1999); *State* v. *Myers*, 923 P.2d 1024, 1031-32 (Kan. 1996) (holding that law was nevertheless punitive), *cert. denied*, 521 U.S. 1118 (1997); *State* v. *Burr*, 598 N.W.2d 147, 153 (N.D. 1999); *Commonwealth* v. *Gaffney*, 733 A.2d 616, 619 (Pa. 1999); *State* v. *Cook*, 700 N.E.2d 570, 580-581 (Ohio 1998), *cert. denied*, 525 U.S. 1182 (1999); *State* v. *Pickens*, 558 N.W.2d 396, 400 (Iowa 1997); *Opinion of the Justices*, 668 N.E.2d 738, 752 (Mass. 1996); *Snyder* v. *State*, 912 P.2d 1127, 1131 (Wyo. 1996); *Doe* v. *Poritz*, 662 A.2d 367, 404 (N.J. 1995); *State* v. *Costello*, 643 A.2d 531, 533 (N.H. 1994); *State* v. *Ward*,

ture viewed [the ASORA] as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information." Pet. App. 11a. In other words, the law was intended to protect the public against future harm, not to punish people for past acts. The Ninth Circuit therefore "conclude[d] that the legislative intent of the Act is non-punitive." *Id.* at 12a. Although the court erred in the remainder of its ex post facto analysis, that conclusion was plainly correct.

The legislature's non-punitive, regulatory intent is confirmed by the findings set forth in the ASORA itself. The statute expressly provides:

> The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety. [1994 Alaska Sess. Laws ch. 41, § 1.]

The express purpose of the law is "protecting the public" and "protecting the public safety." *See Patterson*, 985 P.2d at 1011 ("the articulated purpose of ASORA is regulatory and based on public safety concerns"). That statement of purpose is conclusive as to the outcome of the first step in the ex post facto analysis. But in any event, that non-punitive

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869 P.2d 1062, 1068 (Wash. 1994) (en banc); *cf. State* v. *Noble*, 829 P.2d 1217, 1221 (Ariz. 1992) (en banc) (finding no ex post facto violation without finding of legislative purpose).

purpose is confirmed by the methods chosen to accomplish it. The law simply allows the government to collect truthful information, and to make it available to those who choose to learn it. Through these means, Alaska (1) has provided information people may consider pertinent in protecting their own safety—and, most importantly, the safety of their children—and (2) has provided law enforcement agencies additional data to enable them to investigate future crimes more efficiently.

There is no indication of punitive intent in the structure of the law. It imposes no legal restraints or disabilities on anyone. There are no restrictions on where registrants can live, travel, or work, what they can do, or with whom they may associate. Other than the ministerial acts of registering once in person and providing address change notifications and quarterly or annual written updates, the law imposes no legal requirements on offenders at all.

To the extent it is relevant, the legislative history amply confirms this non-punitive intent. The ASORA was prompted by evidence that Alaska had one of the highest rates of sexual offenses in the Nation, and that sex offenders had high rates of recidivism.[12] Lawmakers also heard evi-

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[12] *See, e.g., Senate Judiciary Hearing* at 9 (testimony that Alaska leads the Nation in child sexual abuse, is second in the Nation in sexual assaults, and that sexual offenders have the highest recidivism rate) (No. 505); *House Judiciary Hearing* at 9 (same) (No. 612); *id.* at 13 (testimony that sex offenders are recidivist threats for their entire life) (No. 283), *id.* at 17 (testimony that rate of rape in Alaska had increased 91% in previous two years) (No. 000); *Senate Finance Hearing* at 3 (testimony that recidivism rate for sex offenders is 80%); *Minutes of Hearing Before House State Affairs Comm.* ("*House State Affairs Hearing*"), 18th Alaska Legis., 1st Sess. 9 (Feb. 2, 1993) (testimony that Alaska is "the rape capital of the nation") (No. 343); *id.* at 10 (testimony that sex offenders have recidivism rates of 20-40% even with treatment)

dence that increasing the availability of information about offenders would allow parents and others to better protect children and other vulnerable people, and would allow law enforcement to locate potential suspects in future cases more efficiently.[13] Moreover, as the Ninth Circuit noted, the ASORA "was passed amid popular fear about the *release* of large numbers of sex offenders into the community as a means for members of the community to protect themselves." Pet. App. 11a (emphasis in original). *See House Judiciary Hearing* at 17 (testimony that releases of sex offenders had doubled in past year) (No. 000).

In light of this testimony, the sponsors and supporters of the ASORA made clear, in response to specific questioning regarding the Ex Post Facto Clause, that the Act was not intended to be punitive. Rather, the legislative record shows that the ASORA was intended to further the legitimate regulatory goals of protecting the public from future harm, and aiding law enforcement in investigating future crimes.[14]

(No. 400); *House Finance Hearing* at 7 (testimony that 25% of Alaska jail population were sex offenders).

[13] *See Senate Judiciary Hearing* at 9 (testimony that sexual offender registration laws were supported by law enforcement as a beneficial system for aiding their jobs) (No. 545); *House Judiciary Hearing* at 9 (testimony that new law would aid in apprehension of future offenders) (No. 668); *id.* at 16 (testimony regarding Alaskan parents who did not know of sex offender in neighborhood until after he had lured children to his house) (No. 512); *House Finance Hearing* at 6 (new law would allow more effective screening of people working around children or vulnerable people); *id.* at 7 (new law would give law enforcement better chance of identifying future suspects); *Senate Finance Hearing* at 3 (same); *id.* (testimony that given high recidivism rates it is important for people to have access to information regarding offenders in order to protect themselves and their children).

[14] *See, e.g., Senate Judiciary Hearing* at 12 (statement that it is within the police power of the state to provide public protection

The express legislative findings to that effect are thus clearly supported by the legislative record.

No more is required to demonstrate the legitimate regulatory purposes of the law. The Court has consistently held that laws aimed at protecting the public from future harm by imposing on convicted felons regulatory requirements—even relatively onerous ones—are non-punitive:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation • • •. [*De Veau*, 363 U.S. at 160.]

As this Court has held, "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987).

The Court should therefore follow the unanimous conclusion of the lower courts considering this and similar laws, and hold that the ASORA has a non-punitive intent. That intent, as noted, is controlling on the ex post facto inquiry absent the "clearest proof" that the legislature's expressed intent was a sham designed to mask a true punitive purpose. No such proof exists. Indeed, the means chosen by the legislature to effectuate its purposes—collecting truthful information and making it available to those who choose to learn it—are far less onerous than numerous retroactive regulations this Court has upheld in prior cases.

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and that law is not a punishment for sex offenders but rather was meant for public protection purposes) (statement of Sen. Donley) (No. 175); *House State Affairs Hearing* at 9 (law is regulatory only and did not promulgate an increase in punishment) (No. 289); *House Finance Hearing* at 7 (testimony of Deputy Commissioner of Public Safety that the public deserves the right to protection).

C. This Court Has Historically Displayed A Deep Reluctance To Override A Legislature's Non-Punitive Intent.

Given the rigorous standard of proof required to overcome the legislature's stated intent to regulate rather than punish, it is not surprising that this Court has upheld a variety of retroactive laws enacted with non-punitive intent, "despite the often-severe effects such regulation has had on the persons subject to it." *Flemming*, 363 U.S. at 616 (footnote omitted). This Court has found retroactive laws *not* to violate the Ex Post Facto Clause that have terminated accrued social security benefits because of past conduct, categorically prohibited convicted felons from working in a chosen profession, mandated deportation for conduct occurring before the law's passage, and permitted civil commitment of convicted felons for an indefinite period of time.

The federal law at issue in *Flemming*, for example, retroactively terminated payment of accrued old-age, survivor, and disability benefits to alien residents deported for having been members of the Communist Party. *Id.* at 604-605. This Court held that the law did not violate the Ex Post Facto Clause, because the aim of the statute was not to punish: Congress's stated intent was to condition receipt of benefits on residence in the United States. *Id.* at 619-620. The fact that the law applied only to aliens deported for certain grounds did not make it punitive, because any inference that could be drawn from Congress's denying benefits only to some deportees amounted to only " 'slight implication and vague conjecture,' " insufficient to defeat Congress's non-punitive intent. *Id.* at 620 (quoting *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)).[15]

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[15] *See also Butler* v. *Apfel*, 144 F.3d 622 (9th Cir. 1998) (amendment to Social Security Act precluding incarcerated felons from receiving benefits did not violate Ex Post Facto Clause); *Garner* v. *United States Dep't of Labor*, 221 F.3d 822, 826-827 (5th Cir. 2000) (retroactive application of statute requiring forfeiture of federal employee benefits by those convicted of false statements did not violate Ex Post Facto Clause), *cert. denied*, 532 U.S. 906 (2001).

Laws that prohibit convicted felons from working in a chosen profession also have been repeatedly upheld against Ex Post Facto Clause challenges. In *Hawker* v. *New York*, 170 U.S. 189 (1898), for example, the Court upheld the retroactive application of a state law prohibiting felons from practicing medicine in the State. This Court concluded that the State was "not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." *Id.* at 196.

The Court in *De Veau*, *supra*, similarly upheld the retroactive application of a state law effectively barring convicted felons from serving as officers or agents of waterfront unions. While the law doubtless brought "unpleasant consequences * * * to bear upon an individual for prior conduct," it was not intended to punish felons for past activity. 363 U.S. at 160. Rather, the legislature's purpose was to create a "scheme of regulation" of the crime-infested New York waterfront, and "for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." *Id.* *See also Hudson*, 522 U.S. at 103-105 (petitioners' debarment from the banking industry did not amount to criminal punishment, because Congress had intended debarment sanction to be "civil in nature," and petitioners had made "very little showing, to say nothing of the 'clearest proof,' " that the sanction was actually punitive); *Ex Parte Wall*, 107 U.S. 265, 288-289 (1883) (disbarment from roll of attorneys not "punishment" triggering Fifth and Sixth Amendment protections).[16]

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[16] *See also DiCola* v. *FDA*, 77 F.3d 504, 505, 507 (D.C. Cir. 1996) (federal statute prohibiting convicted felons from "providing services in any capacity" to pharmaceutical industry was "solely remedial" and did not violate Double Jeopardy or Ex Post Facto Clauses); *DeHainaut* v. *Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994)

The Court has repeatedly found deportation not to violate the Ex Post Facto Clause, despite the severity of the sanction. *See Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952) (upholding retroactive application of law deporting legal resident aliens because of their membership in Communist Party). The Court has acknowledged that deportation is a "drastic measure and at times the equivalent of banishment or exile;" indeed, it may deprive a man "of all that makes life worth living." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Yet the Court has held that even such a severe sanction is not "punishment" for purposes of the Ex Post Facto Clause. *See Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (deportation proceeding is "a purely civil action").

And in *Hendricks*, 521 U.S. at 363, the Court held that a law permitting indefinite confinement of "dangerously mentally ill" sex offenders did not constitute punishment for purposes of the Ex Post Facto or Double Jeopardy Clauses. The Court stated that it was the legislature's "manifest intent" to create a civil proceeding, *id.* at 361, and that the law was motivated by a "legitimate nonpunitive governmental objective": protecting the community from harm. *Id.* at 363. The civil commitment law imposed severe—and potentially lifelong—restraints on the liberty of sex offenders confined under its terms, but even that harsh restriction did not suffice to overcome the legislature's clear regulatory intent. *Id.*

Thus, as this Court observed in *Collins* v. *Youngblood*, 497 U.S. 37, 50 (1990), it will not suffice under the Ex Post Facto

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(upholding against ex post facto challenge a federal policy indefinitely barring air traffic controllers discharged for striking against government from re-entering the profession), *cert. denied*, 514 U.S. 1050 (1995).

Clause to show that a retroactive law merely "alters the situation of a party to his disadvantage;" retroactive laws imposing undeniably serious burdens have been upheld against ex post facto challenges. Rather, the law's controlling intent—or its unmistakable effect—must be to punish. *Id.* at 41; *see Flemming*, 363 U.S. at 617. Indeed, the Court has found laws enacted with arguably mixed or unclear legislative intent to violate the Clause *only* where the laws had the effect of increasing the duration of a prisoner's confinement or decreasing the quantum of proof necessary for conviction.[17] *See, e.g., Lynce* v. *Mathis*, 519 U.S. 433, 445 (1997) (statute retroactively canceling early release credits for prisoners convicted of murder or related offenses violated Ex Post Facto Clause); *Weaver* v. *Graham*, 450 U.S. 24 (1981) (invalidating state law changing calculus for convicts' "good time" credits as violation of Ex Post Facto Clause; although the new law increased other opportunities for such credits, its effect was to delay release of certain prisoners); *Lindsey* v. *Washington*, 301 U.S. 397, 401-402 (1937) (state law that converted maximum sentence into mandatory sentence violated Ex Post Facto Clause when applied to offense committed before its enactment).[18]

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[17] There has been only one of the latter type of case: *Carmell* v. *Texas*, 529 U.S. 513 (2000), which involved a state law amended to provide that an accused sex offender could be convicted on the minor victim's testimony alone; previously the law had required additional corroborating evidence to support a conviction.

[18] The Court has not hesitated to strike down laws enacted with transparently punitive purpose that extend the duration of confinement or exact other harsh sanctions. *See Miller* v. *Florida*, 482 U.S. 423, 433 (1987) (invalidating law retroactively lengthening criminal sentences, where "sole reason" for the new law was to "punish sex offenders more heavily"). *See also Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 376-377, 380 (1866) (invalidating federal statute requiring attorneys to take an oath of loyalty to the United States because the statute was "a means for the infliction of punishment"); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320

As commentators have noted, moreover, the Court has *never* found a law enacted with non-punitive intent to violate the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors—as the Ninth Circuit did below.[19] We turn to those factors now.

II. THE EFFECT OF THE ASORA IS NOT PUNITIVE.

A. The *Mendoza-Martinez* Factors.

When this Court has examined whether the effect of a law is punitive, it has looked to the following factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may

(1866) (striking down statute requiring priests, lawyers, teachers, and others to take oath of loyalty to the United States, upon finding that the disabilities created by the requirement were "exacted * * * because it was thought that the * * * acts [prohibited under the oath] deserved punishment"); *cf. Trop*, 356 U.S. at 97 (plurality) (statute stripping convicted military deserters of United States citizenship had "no other legitimate purpose" but to punish).

[19] *See* Andrew J. Gottman, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause*, 56 Wash. & Lee L. Rev. 591, 644 (1999) ("The Supreme Court has never invalidated a law under the Ex Post Facto Clause using the *Mendoza-Martinez* factors"); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Civil-Criminal Distinction*, 42 Hast. L.J. 1325, 1358 (1991) (finding no Supreme Court case "in which the [*Mendoza*] factors have ever added up to a finding that a proceeding was criminal for all constitutional purposes").

> rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *. [*Mendoza-Martinez*, 372 U.S. at 168-169 (footnotes omitted).]

The *Mendoza-Martinez* factors are culled from cases variously addressing whether a law is "punishment" under the Fifth, Sixth,[20] and Eighth[21] Amendments, and the constitutional prohibition against bills of attainder,[22] as well as the Ex Post Facto Clause.[23] Because the *Mendoza-Martinez* considerations were gathered from a number of different constitutional contexts, some prove more useful than others in an Ex Post Facto Clause inquiry. The question "whether the behavior to which [the new law] applies is already a crime," for example, is doubtless relevant to an inquiry under the Double Jeopardy Clause, *see Mendoza-Martinez*, 372 U.S. at 168 (citing *La Franca*, 282 U.S. at 572-573), but less so in determining whether a law exacts retroactive punishment in violation of the Ex Post Facto Clause. Because the factors are designed to apply across a variety of constitutional contexts, this Court has recognized that they are "neither exhaustive nor dispositive" and are meant for

[20] *See Mendoza-Martinez*, 372 U.S. at 168 (citing, *inter alia*, *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931) (invalidating punitive monetary penalty as violating the Double Jeopardy Clause) and *Wong Wing* v. *United States*, 163 U.S. 228, 237-238 (1896) (striking down law requiring illegal aliens to serve one year's hard labor in prison before deportation, on Fifth and Sixth Amendment grounds)).

[21] *See Mendoza-Martinez*, 372 U.S. at 168 (citing *Trop*, 356 U.S. at 96 (striking down law stripping citizenship on Eighth Amendment grounds)).

[22] *See Mendoza-Martinez*, 372 U.S. at 168 (citing *United States* v. *Lovett*, 328 U.S. 303, 316 (1946) (invalidating bill of attainder)).

[23] *See Mendoza-Martinez*, 372 U.S. at 168 (citing, *inter alia*, *Flemming*, 363 U.S. at 617, and *Cummings*, 71 U.S. at 320-321).

"guidance" only. *Ward*, 448 U.S. at 249; *see also United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 365 n.7 (1984).

And while this Court's "intent-effects" test looks to the *Mendoza-Martinez* factors under the "effects" prong, one of the seven factors is itself aimed at legislative intent: "whether an alternative purpose to which [the law] may rationally be connected is assignable for it." 372 U.S. at 168-169. While this Court has cautioned that no one *Mendoza-Martinez* factor should be elevated to "dispositive" status, *Hudson*, 522 U.S. at 101, the Court has also noted that this "alternative purpose" inquiry is "[m]ost significant." *Ursery*, 518 U.S. at 290; *see also Moore*, 253 F.3d at 873 (same); *Russell*, 124 F.3d at 1091 (same).[24]

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[24] The Court has on occasion articulated different approaches to the question whether a statute inflicts forbidden punishment, but legislative intent remains the paramount inquiry under these formulations as well. In *Salerno*, for example, the Court cited *Mendoza-Martinez* but formulated the test this way:

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on " 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " [481 U.S. at 747 (quoting *Schall* v. *Martin*, 467 U.S. 253, 269 (1984) (quoting *Mendoza-Martinez*, 372 U.S. at 168-169)).]

And in *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), the Court articulated

> three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." [quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 475-476, 478 (1977).]

Like the intent-effects test itself, each of these tests highlights the importance of legislative intent in the Ex Post Facto Clause inquiry.

The Ninth Circuit ignored all this when it examined the allegedly punitive effects of the ASORA. The court instead gave scant weight to the "clearest proof" standard, a point confirmed by the fact that the change to that standard in the amended opinion produced no change whatever in the substantive analysis. *See supra* n.8.

B. The Ninth Circuit's Assessment Of The *Mendoza-Martinez* Factors Was Critically Flawed And Did Not Support A Finding By The "Clearest Proof" That The ASORA Is Punitive.

The Ninth Circuit correctly found three of the *Mendoza-Martinez* factors to weigh against a finding of punitive effect.

Historical Punishment. First, the panel recognized that registration and notification provisions like those in the ASORA are not historically regarded as punishment. Pet. App. 18a. As the same court earlier put it in *Russell*, registration is "typically and historically a regulatory measure." 124 F.3d at 1089. *See also Doe* v. *Pataki*, 120 F.3d at 1285 (registration "does not resemble any measures traditionally considered punitive").

The Act's notification provisions likewise are a far cry from the historical punishments to which *Mendoza-Martinez* referred. *See* 372 U.S. at 168 (citing, *inter alia*, *Wong Wing*, 163 U.S. 228 (one year's imprisonment at hard labor constitutes "punishment"), *Mackin* v. *United States*, 117 U.S. 348 (1886) (two years' imprisonment), and *Ex Parte Wilson*, 114 U.S. 417 (1885) (15 years' imprisonment)). Notification provisions cannot be compared with physical public punishments like whipping, branding, or the pillory, all of which required "the physical participation of the offender, and

typically required a direct confrontation"—orchestrated and encouraged by the government—between the offender and the public. *Russell*, 124 F.3d at 1091-92; *see also Femedeer*, 227 F.3d at 1250-51; *Doe* v. *Pataki*, 120 F.3d at 1284 ("traditional shaming penalties such as branding or the stocks enlisted the offender's physical participation in his own degradation;" notification "imposes no physical pain, mark, or restraint on the offender"). As the court recognized in *Russell*, sex offender notification provisions are more akin to " 'wanted' posters and warnings about escaped prisoners;" such notices have never been regarded as punishment. 124 F.3d at 1092.

Scienter. The Ninth Circuit also correctly found that the ASORA did not come into play "only on a finding of scienter." *Mendoza-Martinez*, 372 U.S. at 168; *see* Pet. App. 18a-19a. The panel reached that conclusion, however, by the wrong route. It recognized that "[a] defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter." Pet. App. 18a. But because the panel viewed some of the offenses triggering the ASORA as "strict liability" offenses—i.e., those requiring no proof that the offender knew the victim's age—the panel concluded that the ASORA did not come into play "*only* upon a finding of scienter." *Id.* at 19a (emphasis in original).

But whether the *underlying* offenses triggering application of the ASORA require a finding of scienter is irrelevant. The question is whether application of the ASORA itself—the challenged law—requires such a finding. It does not. The ASORA is triggered not upon a finding of scienter, but upon the existence of a predicate fact: conviction of one of the sex offenses specified under the statute. *See Hudson*, 522 U.S. at 104 (law authorizing debarment from banking industry did not come into play on a finding of scienter; the law applied to "any person 'who violates' any of the underlying banking statutes, without regard to the violator's state of mind").

Other courts of appeal to have addressed the scienter factor have adopted this approach. *See Femedeer*, 227 F.3d at 1251-52 (sex offender statute "on its face * * * does not impose a scienter requirement"); *Cutshall*, 193 F.3d at 475 (state sex offender registration act "applies to persons convicted of any one of the sex offenses listed in the statute, without inquiry into the offender's state of mind"); *cf. Doe* v. *Pataki*, 120 F.3d at 1281 (prior conviction used " 'solely for evidentiary purposes' " under the statute) (quoting *Hendricks*, 521 U.S. at 362).

Alternative, Non-Punitive Purpose. Finally, the Ninth Circuit found that the "[m]ost significant" *Mendoza-Martinez* factor, *Ursery*, 518 U.S. at 290—whether the law has an alternative non-punitive purpose that can rationally be assigned to it—weighed against finding the ASORA punitive. The panel recognized that the non-punitive purpose connected to the Act, "of course, is public safety, which is advanced by alerting the public to the risk of sex offenders in their communities." Pet. App. 23a. All the other courts to have considered the issue agree. *See, e.g., Femedeer*, 227 F.3d at 1253; *Cutshall*, 193 F.3d at 476; *Russell*, 124 F.3d at 1089, 1091; *E.B.*, 119 F.3d at 1097.

Despite having found three factors—in addition to the legislature's clear non-punitive intent—to weigh against a finding that the ASORA was punitive, the Ninth Circuit nonetheless concluded that the other four *Mendoza-Martinez* factors collectively provided the "clearest proof" of the ASORA's punitive effect. Pet. App. 28a. Its analysis of those factors was deeply flawed.

Affirmative Disability Or Restraint. 1. The ASORA does not impose an "affirmative disability or restraint" on registrants. *See Mendoza-Martinez*, 372 U.S. at 168. This Court in *Hudson* likened that term, as "normally understood," to the " 'infamous punishment' of imprisonment." 522 U.S. at 104 (quoting *Flemming*, 363 U.S. at 617); *see*

also Seling v. *Young*, 531 U.S. 250, 272-273 (2001) (Thomas, J., concurring in the judgment) (equating "affirmative disability or restraint" with "confinement"); *compare Hendricks*, 521 U.S. at 362 (noting that civil commitment scheme "does involve an affirmative restraint," but finding that disability outweighed by legislature's non-punitive purpose). The ASORA imposes on registrants no physical restraint of any kind. It does not restrict their freedom of movement, does not require pre-clearance before they can switch jobs or residences, and does not restrict them from living or working in any part of the community. *See, e.g., Femedeer*, 227 F.3d at 1250 (offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire"); *Cutshall*, 193 F.3d at 474; *E.B.*, 119 F.3d at 1102.[25]

2. According to the Ninth Circuit, however, the Act's registration provisions "impose a significant affirmative disability" because they "subject[] offenders to onerous conditions"—namely, the requirement that certain sex offenders, like respondents, "re-register at police stations four times each year every year of their lives." Pet. App. 13a-14a. The court viewed the requirement that offenders "appear in person at a police station on each occasion" as the critical factor making the law impermissibly "onerous." *Id.* at 14a.

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[25] Contrary to the Ninth Circuit's conclusion, quarterly or annual verification is not "in some respects * * * similar to probation or supervised release." Pet. App. 13a; *see also id.* at 19a-20a. Probation conditions are more burdensome and generally include participation in treatment programs, performance of community service, and restrictions regarding alcohol consumption, leaving the jurisdiction, and persons with whom the probationer can associate. *See* Alaska Stat. §§ 12.55.090-.101. Unlike the requirements of the ASORA, probation is quite plainly an alternative criminal sentence. Thus, violating a condition of probation can result in revocation and the imposition of a suspended period of imprisonment.

The court's holding was based on a persistent misapprehension of the relevant provision of the ASORA. The ASORA specifically permits registrants to submit "written verification" of their registry information quarterly or yearly. *See* Alaska Stat. §§ 12.63.010(d)(1) (annual verification), (d)(2) (quarterly verification). The Alaska Code provisions implementing the ASORA similarly make clear that registrants may verify their information by mail, rather than in person. The relevant Code provision specifies that

> When an offender submits a registration form to a registration agency *without appearing in person*, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies * * * the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections. [13 Alaska Admin. Code § 09.025(d) (emphasis added).]

See also id. § 09.025(e) (information is considered submitted "on the date * * * it is postmarked, if mailed").

To be sure, the State bears significant responsibility for the panel's initial confusion. Asked at oral argument whether registrants must "go to the police station" to verify their registry information, counsel for the State responded, "under the current law, yes." *See* Pet. App. 7a n.4. The State's rehearing petition, however, corrected the misstatement. But the Ninth Circuit's amended opinion nonetheless persisted in placing heavy reliance on the supposed requirement of quarterly or annual "in-person" verification. *See id.* at 7a, 14a, 19a, 20a, 27a, 28a. The panel based its holding entirely on counsel's statement at oral argument. *Id.* at 7a n.4. Thus, in the face of the plain text of the statute, its implementing code provisions, and the State's corrective statement in its petition for rehearing, the Ninth Circuit panel opted to retain its demonstrably erroneous interpretation of the ASORA's requirements.

That was wrong. The principles that courts are not bound by stipulations of law, *see, e.g., Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917), and that estoppel does not typically run against the government, *see, e.g., Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 369 (1946), converge to make clear that the court should have decided the case under the correct view of what the ASORA provides. The court of appeals had an independent obligation to determine the meaning of the controlling statute, *see Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (court "retains the independent power to identify and apply the proper construction of governing law"), and a misstatement by counsel during oral argument cannot override the language of the statute.

The Act's registration requirement is, as other courts correctly have found, nothing like the "infamous punishment" of imprisonment. *See Cutshall*, 193 F.3d at 474; *Doe* v. *Pataki*, 120 F.3d at 1285; *E.B.*, 119 F.3d at 1102. The Act's requirement that certain offenders verify their information quarterly is in keeping with the federal Wetterling Act, which encourages States to require sex offenders to "verify the[ir] registration every 90 days after the date of the initial release or commencement of parole." 42 U.S.C. § 14071(b)(3)(B). *See also* U.S. Dep't of Justice, Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) (http://www.csom.org/pubs/sexreg.html) (noting that "22 states require sexually violent predators to update their address information quarterly with law enforcement"). Quarterly (or more frequent) reporting requirements are a common feature of everyday life. *See Lambert* v. *California*, 355 U.S. 225, 229 (1957) ("Registration laws are common and their range is wide.").[26]

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[26] *See, e.g.*, 2 U.S.C. § 434 (requiring candidates and campaign committees to file monthly or quarterly reports of campaign contributions); 7 U.S.C. § 6f (authorizing CFTC to require futures merchants to file quarterly reports detailing their financial activities); 15 U.S.C. § 78o-5(b)(2)(A) (authorizing SEC to require registered government securities brokers and dealers to file quarterly reports of their financial and securities activities); 17 U.S.C. § 1003(c) (requiring distributors of digital audio recording devices to file quarterly statement of accounts with Register of Copyrights); 26 U.S.C. § 527(j)(2) (requiring political organizations that accept contributions or make expenditures for electioneering functions to file election-year quarterly reports listing contributors and detailing expenditures); 30 U.S.C. § 1267(b)(1) (requiring mining permittees to make monthly reports of data required by the Department of the Interior); *id.* § 1232(c) (requiring coal mine operators to submit quarterly production statements); 42 U.S.C. § 1320b-7(a)(3) (requiring employers in States participating in social welfare programs to file quarterly wage reports with state agencies); 42 U.S.C. § 7671b (requiring those trading in ozone depleting substances to file annual or quarterly reports with EPA setting forth amount produced, imported, or exported); 49 U.S.C. § 30120(d) (requiring car manufacturers who have sold defective cars to provide quarterly reports on progress of the resulting notification programs).

Even if it were true, moreover, that the ASORA required quarterly in-person, rather than written, verification for those convicted of certain offenses, that would not transform the registration requirement into an "affirmative disability or restraint." If Kansas's statute permitting indefinite civil commitment of certain sexual predators does not impose an unduly punitive "affirmative disability or restraint," in light of the non-punitive purpose of the civil commitment statute, *see Hendricks*, 521 U.S. at 362-363, requiring offenders convicted of aggravated or multiple sex offenses to verify their information every 90 days—whether in person or not—similarly cannot qualify as an unduly punitive restraint, given the concededly non-punitive purposes of the ASORA. *See Doe* v. *Pataki*, 120 F.3d at 1284-85 (rejecting ex post facto challenge to New York law requiring quarterly in-person verification for certain offenders for at least ten years and potentially for life).

3. The Ninth Circuit also found that the Department of Public Safety's practice of posting its sex offender registry on the Internet imposed a "substantial" and "burdensome" "affirmative disability or restraint" on registrants, because it exposed them to widespread "community obloquy and scorn that damage them personally and professionally." Pet. App. 17a, 13a, 14a. But the posting of the registry on the Internet imposes no affirmative disability or restraint at all on a registrant, and certainly nothing akin to the " 'infamous punishment' of imprisonment." *See Flemming*, 363 U.S. at 617. The Internet is simply the most efficient—and an increasingly common—way of making truthful information available to the public. *See Ashcroft* v. *ACLU*, 122 S. Ct. 1700, 1703 & n.2 (2002). As the Tenth Circuit observed in *Femedeer*, posting public information on the Internet "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." 227 F.3d at 1251. It is a particularly useful means of making that information available to the far-flung reaches of our largest State, and of ensuring—through daily updates—that the information is current and accurate.

Information about criminal records is routinely made available to the public; indeed, criminal trials must be open to the public. Yet even though that information has always had the potential for negative collateral consequences as a result of the actions of those who learn it, making the information available to the public has never been considered additional "punishment" for the crime itself. *See E.B.*, 119 F.3d at 1099-1100. This Court has never held that a law imposes an "affirmative disability or restraint" as a result of actions that members of the public—not the State—may or may not take.

Nor, moreover, is passive notification on the Internet as invasive as other active steps States may take to notify communities of the presence of sex offenders. Some States, for example, permit law enforcement officials to go door-to-door in an offender's neighborhood to inform community

members of his presence, *see* Del. Code Ann. tit. 11, § 4121(a)(1) (2001); *see also* D.C. Code § 22-4011(b)(1)(A), or to publish offenders' names in newspapers, in fliers, or through local television outlets. *See Russell*, 124 F.3d at 1082; Susan D. Oakes, *Megan's Law: Analysis on Whether it is Constitutional to Notify the Public of Sex Offenders via the Internet*, 17 J. Marshall J. Computer & Info. L. 1133, 1142 (1999) (citing statutes). One State requires offenders to announce their presence in the community by personally notifying, by mail, " '[a]t least one person in every residence or business' " within a one-mile radius of the offender's residence. *See State ex rel. Olivieri*, 779 So. 2d at 739 (quoting La. Rev. Stat. Ann. § 15:542(B)(1)(a)). Under all those notification schemes, community members may receive notice of an offender's presence in the neighborhood whether they ask for it or not. In contrast, as this Court recently recognized in *Reno* v. *ACLU*, 521 U.S. 844, 869 (1997), the Internet is "not as 'invasive' as radio or television." For an Internet user to obtain information, he or she must take "a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at 854 (quotation omitted). And as the Tenth Circuit has observed, the fact that Internet users in far-off places can access a State's registry does not mean that they will, or that they would have any interest in doing so. *See Femedeer*, 227 F.3d at 1253.

Alaska's scheme of Internet notification—shared by some thirty other States—thus does not impose an "affirmative disability or restraint" on Alaska registrants even remotely akin to imprisonment or confinement; it is today simply the most expedient method of conveying information to members of the public who are interested in that information. The purposes of the ASORA are constitutional, and they are not rendered unconstitutional because the State elects to implement the Act in the most efficient and economical way. *See Seling* v. *Young*, 531 U.S. at 263 ("The civil nature of a confinement scheme cannot be altered based merely on

vagaries in the implementation of the authorizing statute."); *id.* at 270 n.* (noting "irrelevance of subsequent executive implementation" to ex post facto analysis) (Scalia and Souter, JJ., concurring); *Mendoza-Martinez*, 372 U.S. at 169 ("factors must be considered in relation to the statute on its face"); *supra* n.6.

Traditional Aims Of Punishment. The Ninth Circuit also concluded that the ASORA "furthers the traditional aims of punishment—retribution and deterrence," and counted that *Mendoza-Martinez* factor as weighing in favor of finding the statute punitive. Pet. App. 21a. The court based its conclusion that the ASORA was "inherently retributive" on its erroneous assumption that the Act required in-person quarterly or annual registration. *Id.* at 19a-20a. Moreover, the fact that the ASORA may have a deterrent effect does not make the statute punitive. This Court has long recognized that deterrence " 'may serve civil as well as criminal goals,' " and thus "the mere presence of this purpose is insufficient to render a sanction criminal." *Hudson*, 522 U.S. at 105 (quoting *Ursery*, 518 U.S. at 292); *see also Garner*, 221 F.3d at 827 ("That a statute serves to deter future conduct does not automatically render it punitive, particularly where its overriding goal is remedial"). To hold that every statutory scheme with a deterrent purpose "renders such sanctions 'criminal' * * * would severely undermine the Government's ability to engage in effective regulation." *Hudson*, 522 U.S. at 105. The ASORA may deter future crime by causing those subject to its provisions to appreciate that public awareness may make it more difficult for them to commit future crimes undetected, but that does not make the law punitive.

Application To Behavior That Is Already Criminal. The Ninth Circuit also concluded that the fact that the ASORA "applies to behavior that is already criminal" gave additional support to the "conclusion that its effect is punitive." Pet. App. 21a. That finding is of dubious merit for two reasons. First, as noted, while it may be appropriate in a

Double Jeopardy Clause inquiry to ask whether a law attempts to criminalize behavior that is already subject to criminal penalties under another statute, *see La Franca*, 282 U.S. at 573, it is less apparent how this factor assists in resolving the question presented by the Ex Post Facto Clause: whether a law seeks to impose retroactive punishment. The Ex Post Facto Clause inquiry does not turn on whether the law in question exacts a second criminal punishment for an act already criminally punishable; it asks only whether the law unfairly exacts punishment for past acts—whether or not criminal when done. *See Calder*, 3 U.S. at 390; *Cummings*, 71 U.S. at 325-326.

Nor, moreover, can it be enough to render a statute punitive to find that it is triggered by a criminal violation. "By itself, the fact that a * * * statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Ursery*, 518 U.S. at 292. *See also Ward*, 448 U.S. at 250 (" 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission' ") (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)).

Excessiveness. Finally, the Ninth Circuit concluded that the ASORA was too "excessive"—the final *Mendoza-Martinez* factor—to be non-punitive. "Most important" to its conclusion on this factor was the court's finding that the statute authorized release of "information as to all sex offenders," not just those who had been individually screened and found to "pose[] a risk of recidivism." Pet. App. 24a. Noting that some States individually classify offenders by "risk category" and restrict public notice to those offenders deemed most likely to re-offend, *id.* at 26a, the panel concluded that Alaska's categorical approach to public notice was "exceedingly broad." *Id.* at 27a.[27]

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[27] The federal guidelines implementing the Wetterling Act provide that "States * * * are free under the Act to make judgments

The Ninth Circuit failed to acknowledge, however, that many laws that impose regulatory burdens on convicted felons—and that make no risk assessment at all—have been upheld against Ex Post Facto Clause challenges. In *Hawker*, for example, this Court upheld against an ex post facto challenge a state law barring convicted felons from practicing medicine. The law contained no exception for "reformed" felons, nor did it provide a method for obtaining an exemption from its terms. The law's categorical application did not trouble this Court:

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concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." 64 Fed. Reg. 572, 582 (1999). The guidelines emphasize that States "retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes." *Id.*

More than twenty other States follow Alaska's categorical approach. *See, e.g.*, Ala. Code §§ 15-20-21(1), 15-20-25(b) (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1) (West 2001); Ga. Code Ann. § 42-9-44.1 (2001); 173 Ill. Comp. Stat. Ann. § 152/115, 152/120(c) (West Supp. 2002); Ind. Code Ann. § 5-2-12-11(b) (West 2001); La. Rev. Stat. Ann. § 15:546 (West 2001); Md. Code Ann. § 11-717 (2001); Mich. Compl. Laws Ann. § 28.728(2) (West 2002); Miss. Code Ann. § 45-33-49 (2001); Mo. Ann. Stat. § 589.417.2 (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (2001); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (2001); S.C. Code Ann. Rev. § 23-3-490 (2001); S.D. Codified Laws § 22-22-40 (Michie 2001); Tenn. Code Ann. § 40-39-106(f) (2001; Tex. Crim. Proc. Code Ann. § 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001 & Supp. 2002); Va. Code Ann. § 19.2-390.1(B)-(D) (Michie 2002); W. Va. Code § 151-2-2(h) (2001); Wis. Stat. Ann. § 301.46(5) (West 2001). Hawaii's categorical notification law, Haw. Rev. Stat. § 846E-3, was found to violate the Due Process Clause in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001).

> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. [170 U.S. at 197 (citing cases).]

Sixty years later, in *De Veau*, 363 U.S. 144, this Court upheld against an ex post facto challenge a law effectively banning convicted felons from serving as officials of waterfront unions. The Court rejected the suggestion that the law could have been tailored more closely to exclude only those likely to commit further criminal violations as union officials: "Duly mindful as we are of the promising record of rehabilitation by ex-felons * * * it is not for this Court to substitute its judgment for the [legislature] regarding the social surgery required by a situation as gangrenous as [this]."[28] As this Court similarly noted in *Hendricks*, particularly where the legislature is addressing an intractable social problem susceptible to a variety of remedial approaches, state legislatures have "the widest latitude in drafting" civil remedial statutes. 521 U.S. at 360 n.3 (citing *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983)).[29]

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[28] *Cf. United States* v. *Hemmings*, 258 F.3d 587 (7th Cir. 2001) (statute prohibiting felons from possessing firearms not ex post facto law); *United States* v. *Mitchell*, 209 F.3d 319 (4th Cir.) (same), *cert. denied*, 531 U.S. 849 (2000).

[29] As was explained in hearings on the ASORA, studies demonstrate that sex offenders have high rates of recidivism. *See supra* n.12; *see also* Grant T. Harris, *et al.*, *Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy*, 4 Psychol. Pub. Pol'y & L. 73, 107 (1998) (noting "considerable risk" of recidivism among sex offenders); U.S. Dep't of

The courts of appeal, too, have recognized that the Ex Post Facto Clause does not demand a "perfect fit between ends and means." *Femedeer*, 227 F.3d at 1253 (upholding Internet notification). Similarly rejecting the contention that Louisiana's sex offender registration law was punitive because it "d[id] not condition neighborhood notification on carefully calibrated, individualized determinations of dangerousness," the Fifth Circuit noted:

> "A perfect fit between ends and means" need not exist for the legislature's objective intent to be other than punitive: "If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means." [*Moore*, 253 F.3d at 873 (quoting *E.B.*, 119 F.3d at 1098).]

See also Doe v. *Pataki*, 120 F.3d at 1282-83 ("The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.").

The panel's conclusion that the statute was unduly broad in application is in any event more pertinent to a due process inquiry than to the question whether the law inflicts imper-

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Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 9 (1996). But determining to any degree of certainty whether a *particular* offender is likely to reoffend is far from an exact science. *See, e.g.*, John Monahan, The Clinical Prediction of Violent Behavior (1995). It is in precisely such circumstances that the legislature should be given the most rein in crafting a remedial regulation that adequately protects public safety, giving due weight not only to judgments concerning likelihood of recidivism and the ability to make individual determinations on that score, but also to the extent of the harm caused by such recidivism that may occur.

missible retroactive punishment. The question whether a statute unnecessarily captures offenders who are not dangerous or likely to commit sexual offenses in the future does not turn on whether the law applies retroactively; it turns on whether it is rational to categorize all sex offenders as subject to the same registration and notification provisions. That is a due process question. The Ninth Circuit erred in importing that inquiry into its Ex Post Facto Clause analysis.

* * * *

The Ninth Circuit ultimately concluded that its analysis of four *Mendoza-Martinez* factors trumped the legislature's acknowledged non-punitive intent—not to mention three other *Mendoza-Martinez* factors weighing against a finding that the ASORA was punitive. Pet. App. 30a-31a. The court was wrong in its analysis of those four factors and wrong in its ultimate conclusion. This Court has time and again held that even statutes that impose heavy regulatory burdens will not be found to violate the Ex Post Facto Clause if they are enacted with a non-punitive purpose. The ASORA plainly was. Its provisions do not exact punishment; they are intended to protect the public, and ancillary burdens on registrants are an acceptable part of that vital regulatory effort.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

1994 Alaska Session Laws ch. 41, § 1 provides:

The legislature finds that

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety;

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

1994 Alaska Session Laws ch. 41, § 12(a) provides:

A sex offender with only one conviction for a sex offense who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under AS 12.63.010, added by section 4 of this Act. A sex offender who has been unconditionally discharged from a sex offense on or after July 1, 1984, but before the effective date of this Act, shall register under AS 12.63.010, added by section 4 of this Act, by July 1, 1994. A sex offender with two or more convictions for a sex offense before the effective date of this Act, regardless of whether the sex offender was unconditionally released from the sex offense before, on, or after July 1, 1984, shall register under AS 12.63.010, added by section 4 of this Act, by July 1, 1994.

Alaska Statute § 12.63.010 provides:

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's initial registration, provide written

verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901.

Alaska Statute § 12.63.020 provides:

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more

than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

(C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the reg-

istration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute § 12.63.030 provides:

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

Alaska Statute § 12.63.100 provides:

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether

the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law or another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(7) "unconditional discharge" has the meaning given in AS 12.55.185.

Alaska Statute § 18.65.087 provides:

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

(1) the sex offender or child kidnapper under AS 12.63;

(2) a post of the Alaska state troopers or a municipal police department under (a) of this section;

(3) a court judgment under AS 12.55.148;

(4) the Department of Corrections under AS 33.30.012 or 33.30.035;

(5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) Information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the

fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender a child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 – 40.25.220.

13 Alaska Administrative Code § 09.025 provides:

(a) The department will approve or provide forms for an offender or a registration agency to submit registration information to the department, including

(1) initial registration information required under AS 12.63.010(b)(1);

(2) a photograph required under AS 12.63.010(b)(2);

(3) a set of fingerprints required under AS 12.63.010(b)(2);

(4) notice of change of address required under AS 12.63.010(c);

(5) annual or quarterly verification of registration information required under AS 12.63.010(d);

(6) proof of unconditional discharge date as provided in AS 12.63.020(a)(2)(A) and (C) and 12.63.020(b);

(7) proof of compliance with a sex offender registration program in a jurisdiction outside this state as provided in AS 12.63.020(a)(2)(B);

(8) proof that an offender is not physically present in this state as provided in AS 18.65.087(a);

(9) a request to review or have corrected information maintained in the registry about the offender as provided in AS 18.65.087(d);

(10) a request to appeal an adverse decision under (9) of this subsection.

(b) The department's forms will contain a notice that offenders who move out of this state must comply with registration requirements of their new locations.

(c) When an offender appears in person to submit information to a registration agency, the registration agency shall collect the information from the offender on a form approved or provided by the department. The registration agency shall review the completed form in the presence of the offender. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency may not accept the form until the offender makes all necessary corrections.

(d) When an offender submits a registration form to a registration agency without appearing in person, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections.

(e) If registration information is accepted by a registration agency, an offender is considered to have submitted the information on the date that

(1) it is delivered in person to a registration agency;

(2) it is postmarked, if mailed;

(3) delivery is documented according to written instructions on a registration form, if a method of delivery other than in-person or mail is approved by the department.

13 Alaska Administrative Code § 09.030 provides:

(a) Within 90 days after an offender registers under this chapter, the department will mail the offender a registration verification form that includes, based on the most recent information the department has obtained about the offender under AS 18.65.087(a),

(1) a statement of the duration of the offender's duty to register;

(2) an explanation of the annual or quarterly schedule by which the offender must submit registration verification information to the department for the duration of the offender's duty to register;

(3) the name of the offender's registration agency.

(b) If five or more years have passed since the date of an offender's registration photograph or there is another reason to believe the offender's appearance has changed significantly, a registration agency may instruct the offender in writing

(1) to appear in person at the registration agency to allow a photograph to be taken; or

(2) if authorized in writing by the department, to submit a new photograph without appearing in person.

13 Alaska Administrative Code § 09.050 provides:

(a) The department will provide information in the central registry that is subject to public disclosure under AS 18.65.087 for any purpose, to any person, without charge, by posting or otherwise making it available for public viewing in printed or electronic form.

(b) The department will charge a fee of $10 for each request to provide

(1) a printed copy, including a photograph if its is available, of registry information about one registrant who is specified by name; or

(2) a printed copy of the list of all registrants in a geographical area; in this paragraph, "geographical area" means

(A) a municipality or village;

(B) an area designated by a single postal ZIP code; or

(C) a street name within a specified municipality or village.

(c) If the department determines that it is in the public interest, the department will reduce or waive the fee described in (b) of this section.

13 Alaska Administrative Code § 09.060 provides:

(a) Upon receiving a completed department form from a person asking the department to review or correct information maintained in the registry about that person, the department will respond in writing within 30 days. If the request is denied, the department will state the reasons for the decision.

(b) An adverse response under (a) of this section may be appealed to the commissioner within 30 days after the

person receives the response. The appeal must be in writing and must set out the reasons for the appeal. The commissioner will respond in writing within 45 days after receipt of the appeal.

(c) Repealed 11/3/99.

(d) Failure of the appropriate official to issue a response within the time limits described in (a) or (b) of this section is a denial of the request or appeal.

13 Alaska Administrative Code § 09.900 provides:

(a) In this chapter and AS 12.63, unless the context requires otherwise, "Alaska state trooper post" means a permanent office of the department's division of Alaska state troopers or division of fish and wildlife protection.

(b) In this chapter, unless the context requires otherwise,

(1) "conviction" has the meaning given in AS 12.63.100;

(2) "days" means calendar days;

(3) "department" means the Department of Public Safety;

(4) "offender" means a person required to comply with registration requirements under AS 12.63; "offender" includes both a sex offender and a child kidnapper;

(5) "offense" means a conviction for which a person is required to register under AS 12.63;

(6) "registration agency" means

(A) for an offender who is incarcerated in a state correctional facility, the state correctional facility in which the offender is incarcerated;

(B) for an offender who is not incarcerated in a state correctional facility

(i) if the offender's residence address is in Anchorage, the department's permits and licensing unit in Anchorage;

(ii) if the offender's residence address is outside of Anchorage, the Alaska state trooper post or municipal police department nearest to the offender's residence address;

(7) "registration program" means a system of registration that qualifies for federal funding under 42 U.S.C. 14071 (Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act);

(8) "state correctional facility" has the meaning given in AS 33.30.901;

(9) "unconditional discharge" has the meaning given in AS 12.55.185.

(c) In AS 18.65.087, "another reliable source" includes, upon verification by the department, the following:

(1) a court of another jurisdiction;

(2) the victim of the offense or a member of the victim's family;

(3) an employer of the offender;

(4) an acquaintance or a neighbor of the offender;

(5) a member of the offender's family.

(13)

Supreme Court, U.S.
FILED
AUG 5 2002

No. 01-729

In The
Supreme Court of the United States

GLENN G. GODFREY and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

(a). The Respondents.

Seventeen years ago, John Doe I was convicted of intra-family sexual abuse and sentenced to 8-years in prison.[1] He was released from prison in 1990 to serve out a period of mandatory parole and supervised probation. *Id.* Citing his low risk for reoffense and his compliance with treatment program requirements, the Alaska Board of Parole released him two years early to serve out the remainder of his supervised probation. *Id.* He has long since completed his probation, and has been unconditionally discharged, with all of his civil rights restored. *Id.* He is not a pedophile, and treating professionals stated it was unlikely that he would commit another offense. *CR 28.*

After his release from prison, the Alaska Superior Court made a judicial determination that John Doe I was successfully rehabilitated, and it awarded him custody of his minor daughter. *CR 18.* He has since remarried, he has established a business, and he has reunited with his children, including the victim of his offense. *Id.*

Jane Doe is married to John Doe I. *CR 18.* Jane is employed in a professional capacity and she has never been convicted of a criminal offense. She married John Doe I after his release from prison, and was aware of his criminal history. *Id.*

---

[1] *District Court, Clerk's Record, Documents filed under seal in support of Docket 18*, hereinafter cited as CR 18.

John Doe II was convicted 18-years ago and sentenced to serve 8-years in prison. *CR 18, Affidavit of John Doe II.* He was released on mandatory parole in 1990, with no residual period of probation. *Id.* He complied with program requirements, successfully completed mandatory parole and was unconditionally discharged in 1992. All of his civil rights were restored, and he is gainfully employed. *Id.*

(b). Pre-1994 Rights.

The Alaska Sex Offender Registration Act ["ASORA"] significantly diminished respondents' pre-existing rights under the Alaska Constitution and state law. After serving their sentences, the Does had the right to be unconditionally discharged with all civil rights restored. *Alaska Stat.* 12.55.185(15); *Alaska Stat.* 33.30.241.

Among these rights is the right under Article I, § 12 of the Alaska Constitution to be reintegrated into society, and to seek to become the object of respect, rather than the object of fear or loathing by their fellow citizens. *Abraham v. State*, 585 P.2d 526, 531 (Alaska 1978). This right to seek reintegration as a full member of society is a right guaranteed by the Alaska Constitution and protected by the Due Process Clause of the 14th Amendment. *Ferguson v. Department of Corrections*, 816 P.2d 134, 139-140 (Alaska 1991). Although the constitutional provision conveying this right was amended in 1994, *18th Legislature's Legislative Resolve No. 58*;[2] the right remains.

[1] Art. I, § 12, entitled "Criminal Administration" was amended in 1994 to add what is commonly referred to as the "victims rights", and now reads, in relevant part: "Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of the victim of crimes,

(Continued on following page)

Alaska Stat. 12.55.005 (2000); *Mathis v. Sauser*, 942 P.2d 1117, 1124 (Alaska 1997) *citing, Ferguson.*

The Does also had a specific right of privacy guaranteed by the Alaska Constitution, and protected by the Due Process Clause of the 14th Amendment. *Alaska Const.* art. I, § 22; *Breeze v. Smith*, 501 P.2d 159, 168 (Alaska 1972). This specific right of privacy was created in the 1970's when the State, using federal grant funds, was developing the Alaska Justice Information System, ["AJIS"] a computerized database of information on the criminal history of individuals. *Inf. Op. Att'y Gen.* 663-86-0479, pp. 18-23 (Dec. 10, 1986). Fearful that such a system was the precursor of a "Big Brother" governmental information bureaucracy, legislators responded with Article I, § 22, which was overwhelmingly approved by the voters and which states: "The right of the people to privacy is recognized and shall not be infringed." *Alaska Const.* art. I, § 22. Inclusion of the right to privacy was intended to exert control over the AJIS system, prohibiting public disclosure of criminal records and other governmental records, and to avoid similar potential abuses with all future systems. *Id.* Responding to adoption of the right of privacy, the legislature adopted the Criminal Justice Information Systems Security and Privacy Act, which limits access to criminal history information. *Alaska Stat., Title 12, Chapter 62.*

Next, the Does had the right to be let alone, especially in one's home. *See Carey v. Brown*, 447 U.S. 455, 470-471

restitution from offender, and the principal of reformation." *Alaska Const.*, art. I, § 12.

(1980); *See generally Lewis, The Jacob Wetterling Crimes Against Children & Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 Harv. C.R.-C.L. L. Rev. 89 (Winter 1996). Encompassed within this important right is the right to be free from unwarranted governmental suspicion, and the right to be free from government initiated intrusions through vigilantism. *Lewis, supra*. This includes the right to personal safety. *Lewis*, 31 Harv. C.R.-C.L. L. Rev. at 106-07.

Additionally, the Does had the right to seek out and engage in employment, and to seek rewards of their own industry. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n. 23 (1976), *citing Truax v. Raich*, 239 U.S. 33, 41 (1915). The right to pursue employment is likewise a fundamental liberty interest. *Id.*

Although the Does were unconditionally discharged, reintegrated, productive citizens of Alaska, with all civil rights restored to them, the Alaska legislature decided that they were dangerous, they should be required to register with the police four times per year, they should be supervised for life and have their personal information and their status of "registered sex offender" announced to the world. *1994 Alaska Sess. Laws, ch. 41, § 1.* The only factor triggering an invasion of protected rights and disenfranchising the Does by labeling them with a badge of infamy [a scarlet letter] is the past conviction. *Alaska Stat.* 12.63.100, *1994 Alaska Sess. Laws, ch. 41, §§ 12, 13.*

(c). The ASORA.

In enacting the ASORA, legislative focus was on sex offenders, and the need to infringe this group's liberty

interests, such as the right of privacy. *1994 Alaska Sess. Laws, ch. 41, § 1.* Indeed, ASORA specifically diminishes the right of privacy by stating it is "less important than the government's interest in public safety." *Id.* The ASORA compels the Does to gather, collate and disclose information to the State so it may be included in a government information database labeling the Does as dangerous persons to be avoided.[3] *Id.* The ASORA requires a subclass of this select group of reintegrated Alaska citizens to report the same information four times per year for the rest of their lives, and the Does are among this subclass. *Alaska Stat.* 12.63.020 (1998). The provisions compelling compliance, and creating the reporting requirements are

[3] It is not true that the ASORA merely allows collection and dissemination of "truthful" information so the public can make their own assessment as to dangerousness. *Pet. Br. 25.* The intent to declare all registrants as presently dangerous persons to be actively avoided is evident from certain amendments to *Alaska Stat.* 11.51.100(a)(2) [*1998 Alaska Sess. Laws, ch. 99, § 5*] *Alaska Stat.* 47.10.011(7) [*1998 Alaska Sess. Laws, ch. 99, § 18*], & *Alaska Stat.* 34.70.050 [*1998 Alaska Sess. Laws, ch. 45 § 54*]. Under these amendments, sale of a home requires disclosure of the registration list, a child in need of aid proceeding can commence if the registered sex offender lives in a home where a minor child resides, and a person can be convicted of a Class C felony, subject to five years in prison, if they let the children go fishing, camping, or generally stay the weekend with their grandfather or grandmother, if either of those grandparents are a registered sex offender.

The legislature is clearly declaring that all registered sex offenders are presently dangerous, and must be actively avoided, and that the public cannot be trusted to make that determination, for if they do so and let the grandchildren go fishing with their grandfather, they are subject to felony prosecution. The so called "truth" the State seeks to disseminate is that all persons previously convicted of a sex offense, regardless of the facts of the individual case, are presently dangerous, will remain dangerous for life, and should be disenfranchised with a modern day scarlet letter indelibly inscribed on their forehead.

codified in Title 12 of the Alaska Statutes, which are part of the State's criminal code, while the administrative and implementation provisions are placed in that section of the code governing the Department of Public Safety [State Police], the Agency charged with administering the sanctions imposed by the ASORA. *See, e.g., Alaska Stat.* 18.65.010-087 (2001).

In enacting the ASORA, the legislature made substantiative and important amendments to the State's criminal code. Criminal Rule 11 was amended to require the court to inform a defendant in writing of the registration and public notification provisions for plea agreements involving a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 10.* The amendments also require inclusion of the registration and public notification provisions as part of the written judgment in any case involving a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 3.*

The ASORA was intended as a means of supervising persons convicted of a sex offense and keeping a clearly definable group under the watchful eye of the State. *Minutes of Hearing Before House Judiciary Comm.*, 20th Alaska Legis., 1st Sess. (Jan. 27, 1997). In fact, in amending the 1994 version of the ASORA, the legislature stated an intent to shorten the time between release from prison and registration so as to decrease the time sex offenders might be unsupervised. *Id.* This intent to keep persons previously convicted of a sex offense under supervision of the State is also clear from the face of the ASORA.

By threat of prosecution and imprisonment, the ASORA requires a person convicted of a sex offense to gather, collate, verify, and deliver a variety of information about themselves and their crimes to the local state

trooper post or police department. *Alaska Stat.* 12.63.010(b) (1998). ASORA even requires registrants to collect and release mental health records and provide information about scars, tattoos, etc. Upon delivery of the information, the individual must allow a photograph to be taken, and provide a set of fingerprints. *Id.* Once the initial registration is completed, registered persons are required to immediately report a change in their address, or a change in the motor vehicles they drive or to which they have access. *Alaska Stat.* 12.63.010(c) (1998). Registrants, like the Does, who fall under the newly defined category of having been convicted of an aggravated sex offense must resubmit the same information four-times per year for the rest of their lives. *Alaska Stat.* 12.63.010(d)(1), 12.63.020(a) (1998).

By allowing unlimited public dissemination of personal information collected and collated by the Does, the ASORA places the Does at substantial risk of loss of housing, employment and community condemnation.[4] *Alaska Stat.* 18.65.087 (1998). Moreover, a scarlet letter attaches when the State places a picture with a host of private information on the Internet with an inscription, "registered sex offender".[5] http://www.dps.state.ak.us/nSorcr/asp

The ASORA contains no procedures through which one may escape its requirements, and no procedure is

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[4] See generally, Brief of New Jersey Public Defender as Amicus Curiae, discussing effect of these "Megan's Laws."

[5] See generally, Brief of Public Defender Service, D.C. as Amicus Curiae, discussing history of shaming punishments and punishments aimed at generating community condemnation.

mandated or even available to determine the degree of risk posed by individual registrants before registration and periodic reporting is required or before information is released to the public. *Id.* The information released to the public includes a photograph, name, home address, place of employment, crimes for which convicted, date and place of conviction, length of sentence, aliases, physical description, description of motor vehicles, license number of motor vehicles, vehicle identification numbers, mental health records, and a description of scars and tattoos. *Alaska Stat.* 18.65.087(b) (1998). The description of motor vehicles is not limited to those owned by the registrant, but includes vehicles to which the registrant has access. *Id.* The applicability provisions of the ASORA require that it be applied retroactively to persons whose offenses were committed prior to its effective date. *1994 Alaska Sess. Laws, ch. 41, § 12; 1998 Alaska Sess. Laws, ch. 106, § 25.* Under these onerous provisions, a registrant required to register for life could be called into the police station at any time and for any reason whatsoever. *Alaska Stat.* 12.63.010(d)(2) (1998).

(d). Evidence Before The District Court.

In seeking and opposing summary judgment before the district court, the Does submitted several exhibits, which were filed under seal to protect the identity of the affiants.[6] The State never contested or rebutted any of this

[6] Exhibits 1-11 are listed as documents filed under seal in support of Docket 107, and will hereinafter be cited as CR 107. Exhibits 12-16 are listed in the court's record as documents under seal filed in support of Docket 101 and will hereinafter be cited as CR 101.

evidence, including the evidence that the State itself used the ASORA to discriminate against family members of a registered sex offender. *CR 101, Exhibit 13.*

The first eight of these exhibits demonstrated beyond doubt that the Alaska public reacts violently when given information regarding the whereabouts of persons previously convicted of an offense. *CR 107.* Exhibit 1 shows signs posted in an individual's yard. *Id.* Exhibits 2 & 3 discloses that a proposed half-way house was burned by what was described as vigilantes. *Id.* Exhibits 4, 5 & 6 documents placement of the sex offender registration list on the Internet, and Exhibit 7 proves that lawmakers knew that widespread public knowledge of past criminal histories could be harmful to those whose histories are released to the public. *CR 107.* After publication of the registration information on the Internet, complaints about an apartment building where sex offenders were being housed resulted in all offenders living there loosing their housing. *CR 107, Exhibit 8.*

In Exhibit 9, a former field service probation officer from the State of Alaska, Department of Corrections ["ADOC"] opined that the ASORA was nothing more than an extension of post-incarceration supervision. *CR 107.* She reached this conclusion based upon her expertise in the field, and based upon her review and knowledge of existing supervision mechanisms then existing in Alaska law. *Id.* Her affidavit also provided the Court with considerable insight as to the effect of the ASORA.

During her term of employment with ADOC, this probation officer supervised hundreds of released individuals who had been convicted of a sex offense. *Id., p. 2.*

She was familiar with the ASORA's requirements and was employed by ADOC when it went into effect. *Id., p. 3.* During that time, she supervised only those persons who had previously been convicted of a sex offense, and she witnessed persons on her case load losing their housing and employment due to the public disclosure requirements of the ASORA. *Id., p. 4.* Moreover, she saw first hand how the ASORA invaded the marital home and caused offenders to move out to protect their families. *Id.* Based on her years of professional experience, she opined that the ASORA had a punitive effect on those individuals being released and who were attempting to reintegrate into the community. *Id., pp. 4-5.* She also concluded that the ASORA had a "regressive impact on individuals who were previously successful in their reintegration into the community." *Id.*

Exhibits 10 & 11 proved that the ASORA undermined the offender's ability to seek out and maintain employment. *CR 107.* Indeed, the affidavit from one employer, who had previously hired persons convicted of a sex offense, stated he would no longer do so if the State was going to publish his business name on the Internet. *Id.* This employer was also concerned that the release of the information would cause future applicants to attempt to hide information, lie on applications for employment, and would affect the interpersonal relationships necessary for productivity in a service related business. *Id.* Other employers had the same concerns. *Id.*

The Affidavit of BB sets forth a telling example how the children of those subjected to the ASORA suffer from its punitive effects, and how the ASORA undermines the ability of an offender to reintegrate into the community. BB was a young man who has never been convicted of any

offense, and who was a junior in high school. He suffered humiliation and trauma because his father was required to register as a sex offender. *CR 101, Affidavit of BB, p. 2.* Moreover, just when this young man was establishing relationships that may last a lifetime, those relationships terminated because the State chose to tell the world that his father was a sex offender that should be considered dangerous. *Id., p. 3.* Even worse, this young man graduated from high school feeling like he was singled out and treated differently from other children merely because the State decided to publish his father's past on the Internet. *Id.*

The ASORA not only harms the registrant's children, but it invades the personal relationships the offender established after his release. Indeed, ML was employed as a mental health counselor, who was working on her Masters Degree in Clinical Social Work. *CR 101, Exhibit 13, Affidavit of ML.* She married a man who was previously convicted of a sex offense, only after she had talked to his probation officer and knew about his entire background and his risk for reoffending. *Id.* After the State chose to tell the world that ML's husband was a sex offender who should be considered dangerous, she tried to complete her practicum with a State Agency. *Id.* ML was first accepted by that Agency, but later rejected solely because her husband's name was published on the sex offender registration list. *Id.*

ML also had several problems at work as a result of the publication, but she chose not to interview for any new positions that may have furthered her career. *Id.* In fact, she put her career on hold, was forced to change her name, and suffered from severe emotional upset and depression because the State chose to publish information about her

husband's past. *Id.* In ML's words, "I don't think its right that I should be ostracized and punished simply because of who I chose to marry, but that is what has happened because of the State's publication of registration information." *Id., p. 7.* ML said "[m]yself and my children suffer daily because of this list and because the State chose to punish me based on who I decided to marry." *Id.*

A woman with no criminal record whatsoever owns a business and serves major clients. *CR 101, Exhibit 15, Affidavit of LB.* She happens to be married to a man who was previously convicted of a sex offense. *Id.* The forced registration and public notification provisions of the ASORA cause her to suffer severe emotional trauma, and nearly destroy her business because major clients stop using her services after the State told the public that her husband is a sex offender that should be considered dangerous. *Id.* Printouts of her husband's information, published by the State, were circulated to clients of LB's business along with a picture. *Id.* Like the erroneous information describing her husband as a dangerous sex offender, his picture was provided by the State, as was the fact that her husband worked in her business. *Id.* LB describes the effect of the ASORA by saying:

> I have seen the harmful effects release of this information has had on my family and I feel that the State of Alaska, by associating my address and my business with my husband's previous offenses, has made me a victim. Until they have gone through it themselves, no one can imagine the emotional upset, embarrassment and humiliation a family must suffer because the State has chosen to compile this information and release it to the world, with no restrictions whatsoever on its use. *CR 101, Exhibit 15 p. 4.*

Notwithstanding the uncontested evidence of excessiveness in relation to the ASORA's assigned purpose, the district court concluded that the ASORA was regulatory, not punitive and retroactive application was not barred by the Ex Post Facto Clause. *Pet. App. 91a.* The Court of Appeals for the Ninth Circuit reversed that decision, and this Court granted certiorari. *Pet. App. 42a.* The Ninth Circuit's ultimate conclusion that the ASORA imposed additional punishment and could not be applied retroactively without violating the Ex Post Facto Clause should be affirmed.

(e). Response to certain misconceptions on the part of petitioners and their amici.

1. This case is not about public access to criminal records.[7] Compelling an individual to compile and produce personal information and photographs, which are then used to label him with a badge of infamy and to supervise that individual for life, purportedly for the sake of public safety, is entirely distinct from public access to court records.[8] This case is about changing the quantum of

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[7] See generally, Brief of Reporters Committee as Amicus Curiae.

[8] These overly broad and punitive laws are justified as an extreme measure in response to the unique and severe threat sex offenders pose to public safety. *Brief of United States, As Amicus Curiae, pp. 2-3.* However, if regulation of the individual is sanctioned as a valid exercise of the State's civil, regulatory authority, let no one doubt that exercise of that immense power over the individual will not end with sex offender registration. *Resp. App. 28a.* In fact, the Alaska legislature has already moved towards expanding this power. In 1996, a Bill was introduced in the Alaska legislature that would have established the same punitive registration requirements for people who abuse their pets. *Resp. App. 28a.* Senate Bill 238 was introduced in January 1996,

(Continued on following page)

punishment, after the fact, as evidenced by ASORA's mission to expand the State's power to regulate the person and not merely his participation in a regulated profession or activity. Regulation of the individual is *based solely on a past criminal conviction*, and occurs even after he is unconditionally discharged from his criminal sentence. ASORA's sanction not only places invasive conditions on the person, it seeks to "regulate" all of his community relationships, social, professional and personal, by labeling him an undesirable to be shunned. Such governmental exposure to infamy is historically punitive, not regulatory.[9] Indeed, it is quintessentially the function of criminal, not civil, law to restrict liberty and attach stigma to a judgment of conviction for the sake of community protection. *See, e.g., United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment"); *4 W. Blackstone, Commentaries*, 11-12 (criminal law seeks to "depriv[e] the party injuring of the power to do future mischief"); *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) (criminal punishment consists of "the loss of liberty and the stigma attaching to the offense"); *Breed v. Jones*, 421 U.S. 519, 529 (1975) (double jeopardy applies in juvenile proceedings because they attach potential loss of liberty and stigma to adjudication of guilt); *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975) (criminal law implicates

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and although it failed to pass, it constitutes clear evidence that these registration laws will not be limited to sex offenders or unique, severe risks to public safety.

[9] See Brief of Public Defender Service, D.C., As Amicus Curiae.

"the defendant's critical interests in liberty and reputation").[10]

2. This Court has not "observed" that sex offender registration has not traditionally been regarded as punishment.[11] Rather, in *Lambert v. California*, 355 U.S. 225, 229 (1957) this Court held that sex offender registration laws differ significantly from those laws which regulate activities. Moreover, this Court held that sex offender registration laws may be too severe for an average member of the community to bear, and that the severity lies in the absence of an opportunity to avoid the law or to defend against any prosecution brought under it. *Lambert*, 355 U.S. at 229; and see *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) (regulation of the individual through civil commitment based solely on the prior conviction would not be sustained in the face of constitutional challenge).

3. This Court is not bound by the Ninth Circuit's conclusion that the ASORA was intended as a regulatory mechanism designed to protect the public through the collection and dissemination of information. *Pet. Br. 16. See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984). Rather, the Court is free to evaluate the ASORA, on its face, and conclude it should be classified as penal for purposes of the Ex Post Facto Clause. In fact, this Court has always applied a *de novo* standard of review when faced with the question whether the law then before it imposed a punishment. *See, e.g., Kennedy v.*

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[10] *Id.*, fn. 6.

[11] Brief of California, ex rel. 41 States as Amicus Curiae, p. 12.

Mendoza-Martinez, 372 U.S. 144 (1963); *Hudson v. United States*, 522 U.S. 93 (1997).

4. This Court does not rely on subjective motivations of the legislature in determining intent. *Lynce v. Mathis*, 519 U.S. 433, 442 (1997). Rather, this Court will focus on a variety of factors considered in relation to the ASORA on its face. *Seling v. Young*, 531 U.S. 250, 251 (2001). The factors this Court has considered include, among others, comparison with other provisions, legislative focus and the extent to which the legislature amended existing law. *Flemming v. Nestor*, 363 U.S. 603, 613 (1960); *Mendoza-Martinez*, 372 U.S. at 180-184; *Hendricks*, 521 U.S. at 360. If the legislative focus was on the group of persons to be regulated, punitive intent will be presumed. *Flemming*, 363 U.S. at 613.

5. Respondents are not required to show that the "stated intent is merely a charade for punitive goals." *Pet. Br. 15*. Nor, are respondents required to show ill-will or bad faith on the part of the legislature. *Id.* The "clearest proof" standard is not an insurmountable burden requiring a showing of ill motive or bad faith, because statutes are not struck down based on ill motive, and this Court does not inquire into the motive of legislators when examining a statute to determine whether it is constitutional. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

6. Contrary to petitioners' apparent belief that "clearest proof" is an insuperable burden, the phrase arose in *Flemming* "to describe the burden of persuasion necessary to demonstrate a criminal and punitive purpose unsupported by 'objective manifestations' of legislative intent." *Hudson*, 522 U.S. at 113 (Souter, J., concurring) (quoting *Flemming*, 363 U.S. at 617). That concept is of

little assistance to the State in this case since ASORA's objective features are overwhelmingly penal. *See id.* at 112-14; *see also id.* at 115-16 (Breyer, J., concurring). There are numerous cases where the Court has rejected civil labels by examining objective realities, for example, where the Act imposed and affirmative disability or restraint, *United States v. Lovett*, 328 U.S. 303, 316 (1946), where the type of sanction imposed has historically been regarded as punishment, *Cummings v. Missouri*, 71 U.S. 277, 320-321 (1866); where the sanction only came into play upon a finding of scienter, *Helwig v. United States*, 188 U.S. 605, 610-612 (1903); where the Act in question promoted traditional aims of punishment – retribution and deterrence, *United States v. Constantine*, 296 U.S. 287, 295 (1935); where the Act only applied to conduct which was already criminal, *Lipke v. Lederer*, 259 U.S. 557, 562 (1922); where no alternative purpose could rationally be assigned, *Cummings, supra*; and where the effect of the Act was excessive in relation to the alternative purpose assigned to it. *Cummings, supra, Helwig, supra*. Indeed, the Court held that a purported civil scheme was punitive simply because of the severity of the effect and because it had an obvious deterrent purpose. *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994). Consequently, "clearest proof" is not an insurmountable burden, and though never defined by the Court, it seems to mean nothing more than the legal maxim that statutes enjoy a presumption of constitutionality, which is shed when they are shown to be unconstitutional. *See Flemming*, 363 U.S. at 617.

SUMMARY OF ARGUMENT

1. The ASORA, a law which regulates the person rather than his participation in an activity or profession, and based solely on the past conviction, is punitive. This conclusion is supported by application of the "intent-effects" test, which test is employed by the Court to determine whether a purported civil, regulatory provision should be classified as criminal. *Hendricks*, 521 U.S. at 361.

2. In applying the "intent-effects" test, this Court first looks for a clearly stated preference on the part of the legislature. *Hendricks*, 521 U.S. at 361. If no clear preference exists, the Court examines the ASORA on its face to determine whether it is regulatory in both structure and design. *Id.* In doing so, factors such as codification, triggering events, and existence of procedural protections are some of the factors that guide the Court to its conclusion. *Hendricks*, 521 U.S. at 361. Indeed, in *Hendricks*, this Court found non-punitive intent because the Act was codified in the probate code, and because the Act was not triggered solely by conviction. In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984), this Court held that one of the most important characteristics of a regulatory law is adequate procedural protections.

3. The Court may also seek to determine whether the ASORA amends the criminal law, and whether it imposes additional sanctions generally imposed by laws that are decidedly penal. *See Mendoza-Martinez*, 372 U.S. at 168-169. Moreover, an important element in establishing an objective manifestation of intent is examination of the focus of the legislature in enacting the ASORA. *Flemming*, 363 U.S. at 613-614. If the legislature focused on an activity from which sex offenders should be barred because

of relevant past conduct, a presumption may exist that the legislature intended the ASORA to be regulatory. *Id.* However, the contrary is true if the focus was on the person or class of persons to whom the ASORA applies. *Id.*

4. In applying this facial examination to the ASORA every relevant factor points to punitive intent and the only conclusion that can be drawn is that the legislature intended the ASORA to be penal. Because there is sufficient risk that retroactive application will increase the punishment for past crimes, the ASORA may not be applied retroactively without violating the Ex Post Facto Clause.

5. Where facial examination is inconclusive, or results in a conclusion that the Act in question is decidedly civil, the Court inquires further to determine whether the challenged Act is so punitive either in purpose or effect that it transforms what was intended as a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 99. In making this determination, several factors are used as guideposts, including:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already criminal, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168-169 (citations omitted).

6. Respondents need only show that any one of these factors, or any combination of two or more demonstrates that the ASORA is excessive in either its purpose or effect. *United States v. Ward*, 448 U.S. 242, 249 (1980); *United States v. One Assortment of 89 Firearms*, 465 U.S. at 365 n.7. The *Mendoza-Martinez* factors are not exhaustive or dispositive and the weight to be given each factor depends upon the context and type of sanction at issue. *Hudson, supra.*

7. The ASORA is not a regulatory law because it does not seek to regulate any activity from which respondents should be barred due to relevant past conduct. Rather, the ASORA is punitive in intent because the legislative focus was the group of persons previously convicted of sex offenses. Moreover, the ASORA is not only codified as criminal, its enactment resulted in substantive amendments to Alaska's criminal laws, demonstrating it was intended to be an integral part of the criminal law. Furthermore, the ASORA unduly infringes upon private interests, including fundamental rights. Because punitive intent is evidenced from the face of the ASORA, the effects need not be considered and it cannot be applied retroactively to persons whose offenses were committed prior to its effective date if there is a sufficient risk that it will increase the punishment for past offenses. *Lynce, supra*. If punitive legislative intent is not evident by examination of the ASORA, the court will nonetheless classify the law as penal if its objective features demonstrate that it is punitive in either purpose or effect. *Hendricks*, 521 U.S. at 361. In applying the seven *Mendoza-Martinez* factors to the ASORA, one results in ambiguous intent, six weigh in on the side of classifying the ASORA as criminal.

ARGUMENT

A. The ASORA is easily distinguishable from other regulatory laws previously upheld by this Court.

The ASORA cannot reasonably be compared to a regulatory law governing the qualifications for a profession, or establishing eligibility for a governmental benefit. *Pet. Br. 28-29, citing, Hawker v. New York*, 170 U.S. 189 (1898). The ASORA is not aimed at regulating an activity from which an offender should be barred due to relevant past conduct. *Pet. Br. 28-32.*

The central premise in cases such as *Hawker*, *DeVeau v. Braisted*, 363 U.S. 144 (1960), and *Hudson*, is that the government may regulate a specific activity and bar felons from participating if relevant past conduct shows an unfitness to participate. In the instant case, the ASORA seeks to protect the public by deterring future conduct. *Pet. Br. 27-32.* The ASORA regulates the individual by compelling them to gather, collate, verify and deliver information to the State and then swear upon oath that the information is true and accurate. *Alaska Stat.* 12.63.010 (1998). The Does must deliver this information and swear this oath four times per year for the rest of their lives. The distinction between the ASORA and regulation of an activity is unmistakably clear. To feel the harsh consequences of the law that regulates an activity, one must first seek to participate in the activity. The ASORA, on the other hand, comes to the individual and compels him to do what the law requires or suffer the consequences of new criminal charges and imprisonment. Moreover, the ASORA does so based solely on a finding of guilt and it operates on a past conviction. Surely the result

in *Hawker* and its progeny would have been different if the law commanded the individual to collect all relevant data and turn it over to the State, so the State could tell the world that the individual was unqualified to practice medicine or work in any profession, and he should be made an outcast in society to be avoided at all cost. The asserted distinction has been recognized by many renown scholars, and was most eloquently articulated by the Honorable Charles Fried, former Associate Justice of the Massachusetts Supreme Judicial Court. In *Doe v. Attorney General*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J. Concurring), Justice Fried characterized regulation of the individual as follows:

> Registration presents a different and importantly distinct kind of constitutional danger . . . [it] forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Clearly, reliance on *Hawker* and its progeny is woefully misplaced. *Pet. Br. 28-32*. Although this Court has been reluctant to overrule a legislature's clearly stated intent to regulate a specific activity, which the government has the power to regulate *Pet. Br. 27-32*, this Court has never failed to distinguish between sanctions that come into play as a relevant incident to regulation of an activity, and sanctions that only come into play based upon a criminal conviction. *Hawker, supra, see also Hendricks*, 521 U.S. at 360 (indicating that if the sanction were imposed based

solely on the past conviction, the Act would not withstand constitutional scrutiny).

B. The structure and design of the ASORA compels the conclusion that it is penal.

In enacting the ASORA, the legislature did not clearly state a preference for a regulatory label. *1994 Alaska Sess. Laws ch. 41, § 1*. Petitioners wrongly contend the legislature's findings are conclusive as to the first step in the intent-effects analysis. *Pet. Br. 24*. This is so, because the only support for that erroneous proposition is that the legislative findings evidence a public protection purpose. *Pet. Br. 24*. However, in Alaska, public protection is one of the mandated goals of penal administration.[12] *Alaska Const.*, art. I, § 12. Because it must be presumed that the legislature was aware of the mandated goals of penal administration, *see State v. Alaska Continental Development Corp.*, 630 P.2d 977, 996 (Alaska 1980); it is unreasonable to infer a regulatory purpose from legislative findings aimed at accomplishing one of those penal goals.[13]

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[12] At the time the ASORA was originally adopted, the goals of penal administration were classically known as "twin goals," (*Abraham, supra*), which were protecting the public and reformation of the offender. In 1994, Article I, § 12 of the Alaska Constitution was amended to add provisions for victims' rights, but the twin goals remain, with the additional goal of community condemnation. *18th Legislature's, Legislative Resolve No. 58 (1994)*.

[13] Petitioners' reliance on legislative history to support a preference for a regulatory label is misplaced. *Pet. Brief, p. 25, fn. 12*. A clearly stated preference for a regulatory label should not be established based on a legislature's subjective motivations. "This Court has recognized from Chief Justice Marshall, to Chief Justice Warren, that determining the subjective intent of legislators is a perilous enterprise." *See*

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1994 Alaska Sess. Laws ch. 41, § 1. Absence of a clearly stated preference for a regulatory label requires examination of the ASORA on its face to determine whether any factors compel the conclusion that the legislature intended the ASORA to be penal.[14] *Hendricks*, 521 U.S. at 361.

Edwards v. Aguillard, 482 U.S. 578, 638 (1987) (dissenting opinion) (citations omitted). If subjective motivations are relevant, then the subjective motivations of those like Senator George Jacko cannot be ignored. In discussing the ASORA, Senator Jacko was clearly motivated by a punitive purpose because he wanted to give sex offenders a choice between registration or death by electrocution. *Minutes of Hearing Before Senate Judiciary Committee, 18th Alaska Legislature, 1st Sess.* (April 20, 1993). Additionally, a close examination of the legislative history, upon which petitioners rely, shows that the legislature did not clearly state a preference for one label or the other; rather that history shows they intended to pass the ASORA even if it increased the punishment for past offenses, and they believed it would be regulatory because courts in other jurisdictions had so ruled when considering challenges to other state laws. *Id. Pet. Br. 25, fn. 12*. A belief that the law would be found to be regulatory when put under constitutional scrutiny does not mean the legislature intended it to be so. The legislative history being inconclusive, at best, the legislative findings are the only evidence of intent. However, these findings are ambiguous, at best, because they merely evidence a public protection purpose. *Alaska Sess. Laws, ch. 41, § 1.* Because public protection is one of the mandated goals of penal administration in Alaska, these findings are not clear evidence of regulatory intent. *Alaska Const.* art. I, § 12.

[14] Petitioners recognize that reliance on the legislature's findings is not conclusive, so they argue that non-punitive purpose is confirmed by the methods chosen to accomplish the stated purpose. *Pet. Br. 24-25*. While petitioners are correct, that absence of a clearly stated preference for a civil label requires examination of the structure and design of the ASORA, petitioners' reasoning is fundamentally flawed. *Id.* Contrary to petitioners' assessment, the ASORA does much more than merely allow the government to collect truthful information and make it available to those who choose to learn it. *Pet. Br. 25*.

The first factor indicating a punitive intent is codification. *Hendricks*, 521 U.S. at 360. The sections of the ASORA, designed to protect the public by requiring released offenders to register with the authorities, were codified in Alaska's criminal code. In *Hendricks*, this Court found civil, remedial intent based, in part, on the fact that the Act was codified in the Kansas probate code rather than in any portion of the criminal code. *Id.* Here, the registration triggering provisions are codified in Alaska's Title 12 which defines punishment and criminal procedure. *Alaska Stat.* 12.63.010. Codification in the criminal code was intended by the drafters and sponsors of the legislation because the sponsors followed the mandates of the Legislative Drafting Manual, which requires new statutes to be codified in the appropriate sections of the code, depending upon the subject matter and purpose of the legislation.[15] Codification in Title 12 of the Alaska Statutes evidences a criminal intent because "[t]he provisions of [that] title apply to all criminal actions and proceedings" *Alaska Stat.* 12.85.010, and that section of the code it entitled "Code of Criminal Procedure." *Alaska Stat.* 12.85.020. Codification in this Title implies an intent to enact a criminal penalty. *Hendricks, supra.*

Although the implementation provisions are codified in Alaska's Title 18, this does not compel the conclusion that punishment is not being administered. It is customary for a legislature to place punishment provisions in the criminal code, and to place the procedure for administering punishment in that section of the code which governs

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[15] This manual can be found at: http://www.legis.state.ak.us/infodocs/draft_manual/DMWeb/DMcover.htm

the particular agency charged with so administering. As an example, sentences of incarceration and supervision through imposition of probation are found under Alaska's Title 12, Chapter 55. The Department of Corrections carries out the court's sentences and supervises both probationers and parolees, and the procedures for doing so are found in Title 33. Hence, placement of the implementation provisions of the ASORA in Title 18 has no bearing on the intent analysis because the important fact is the punitive portions of the ASORA are found in the criminal code along with other penal provisions.

Objective intent to enact a penalty is also evidenced by the object upon which the legislature focused when enacting the ASORA. *Flemming*, 363 U.S. at 613-614. In this instance the legislature was clearly focused on the group of persons to whom the ASORA applies, and not on an activity from which these persons should be barred due to relevant past conduct. *Id.* Indeed, legislative focus on sex offenders is obvious because the legislature focused on unsupported high rates of recidivism; the need to protect the public from sex offenders; the privacy interest of sex offenders, and the need to carve out of an exception to protections guaranteed by Article I, § 22 of the Alaska Constitution by creating a governmental information database that releases criminal history information and brands the unconditionally discharged, reintegrated prior offender for life. *1994 Alaska Sess. Laws, ch. 41, § 1.* "[W]hen conduct is singled out of a class for specially adverse treatment simply because it is specially provocative, there is no escaping the conclusion that punishment is being administered." *Mendoza-Martinez*, 372 U.S. at 196 (Justice BRENNAN, concurring, citing *Flemming*, 363 U.S. at 635-640 (dissenting opinion)).

Punitive intent is also clear because the ASORA amends the State's criminal code and is similar in purpose and effect of other relevant penal provisions. *Mendoza-Martinez*, 372 U.S. at 183; *id.*, n.35, *citing, Helwig*, 188 U.S. at 613-619. There can be no doubt that the ASORA amended the State's criminal code by requiring its provisions be a written part of any judgment entered as a result of a conviction for a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 3.* Furthermore, it amended Alaska's Criminal Rule 11 requiring its provisions be part of any plea agreement entered as a result of a sexual offense. *1994 Alaska Sess. Laws, ch. 41, § 10.* In fact, the legislature found the ASORA to be such a critical part of the punishment, that it is the only aspect of Rule 11 plea agreements that the court must put in writing. *Id.* Finally, the uncontested evidence in the record shows the ASORA fulfills the same purpose and in the same manner as other forms of post-incarceration supervision in Alaska. *CR 107, Exhibit 9.* The character of other relevant penal provisions in Alaska, compared to the character of the ASORA, and the fact that the ASORA simply amends existing criminal law, by adding additional penalties and another form of post-incarceration supervision, is clear evidence of punitive intent. *See Helwig*, 188 U.S. at 613-619.

The lack of procedures designed to protect personal liberty, evidences an intent to enact a penalty. *See One Assortment of 89 Firearms*, 465 U.S. at 363. This conclusion is supported by the fact that the petitioners contend the ASORA is regulatory, and by the fact that for a regulatory law to be valid it must be obvious that the interest of the public requires the law's interference, and second, that the means are reasonably necessary for the accomplished purpose and not unduly oppressive upon individuals.

Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 594-95 (1962) *citing, Lawton v. Steele*, 152 U.S. 133, 137 (1894). In other words, the law must be narrowly tailored to achieve the stated purpose. *NAACP v. Alabama*, 377 U.S. 288, 303-304 (1964):

> The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.*

The ASORA is not narrowly tailored and it does not contain any procedures designed to protect individual liberty. *Alaska Stat.* 12.63.010-100 (1998). The lack of any procedures designed to protect individual liberty is clear evidence of an intent to punish for past conduct.

The ASORA's imposition of a duty on the offender, which duty is imposed solely as a result of the past conviction, is clear evidence of an intent to establish a criminal statutory scheme. It has long been held that laws which compel the doing of an act, after the fact, violates the prohibition of the Ex Post Facto Clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798) ("no man should be compelled to do what the laws do not require"). *Calder's* definition of an ex post facto law has endured for over two hundred years. *California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995). The ASORA is not regulatory because it imposes the duty to report to the authorities, the duty to provide one's fingerprints, the duty to collect and collate information, the duty to swear upon oath the information is true, the duty to provide information that is

otherwise private, and the duty to report to the authorities four times per year for the rest of their lives. No valid regulatory law has ever imposed duties which are triggered solely by the past conviction. *Hendricks, supra.* The *Calder* definition recognizes that restraint not only means confining a person, or holding a person against his will, but it also means to put a compulsion upon the individual. *N.L.R.B. v. Exchange Parts Co.*, 304 F.2d 368, 374 (5th Cir. 1962). By compelling the doing of an act, and eliminating the right of choice, the ASORA does in fact impose a restraint and this is evidence of an intent to punish.

Examination of the structure and design of the ASORA compels the conclusion that the legislature intended to enact a penalty. That being the case, the ASORA should be classified as punishment, retroactive application of which violates the Ex Post Facto Clause. There can be little doubt that if retroactively applied, there is sufficient risk that the ASORA will increase the punishment for past offenses – it imposes a lifetime on an amended version of post-incarceration supervision.

C. Application of the *Mendoza-Martinez* factors compels the conclusion that the ASORA must be reclassified as criminal because it is excessive in its purpose and effect.

It is not true that some of the *Mendoza-Martinez* are irrelevant in an Ex Post Facto Clause inquiry. *Pet. Br. 33.* While some factors might be more important than others, depending upon the facts and circumstances of the individual case, all may be relevant regardless whether the case calls for an Ex Post Facto, Double Jeopardy, or Due Process inquiry. *Id.* This is because, the factors are not

applied to determine whether the sanction violates Due Process, Double Jeopardy, or the Ex Post Facto Clause. Rather, the factors are applied to determine whether a purported civil statute should be reclassified as criminal. *Mendoza-Martinez*, 372 U.S. at 168-169. If the statute is really criminal, then traditional Double Jeopardy, Due Process or Ex Post Facto analysis is then applied to determine whether it fails under the particular constitutional provisions under which the Act is being challenged. Because the challenge here is brought under the Ex Post Facto Clause, if application of the *Mendoza-Martinez* factors proves the ASORA is criminal, then it may not be applied retroactively if there is a sufficient risk that it may increase the punishment for past offenses. *Lynce*, 519 U.S. at 441.

In making the inquiry, whether the ASORA is penal in operation and whether there is sufficient risk that it increases the punishment for past offenses, the subjective intent of the legislature is irrelevant and the Court will look to the consequences of the ASORA's application and enforcement. *Lynce*, 519 U.S. at 440. Application of the *Mendoza-Martinez* factors under this operational approach compels the conclusion that the ASORA must be classified as penal, and it may not be applied retroactively to persons whose offenses were committed prior to its effective date.

Factor 1, Affirmative disability or restraint.

The ASORA imposes an affirmative disability or restraint because it places registrants at a serious disadvantage and it limits or prevents the exercise of fundamental rights. Moreover, the ASORA labels registrants

with a scarlet letter, subjects them to community scorn, and outrage, and it subjects registrants to a lifetime of governmental supervision and monitoring, which is the fundamental equivalent to a lifetime on parole or probation. *See Brief of Public Defender Service, D.C., As Amicus Curiae.*

It is not true that disability or restraint only equates to incarceration. *Pet. Br. 37-38.* Disability or restraint includes inflicting deprivations on an individual in order to prevent his future misconduct. *United States v. Brown*, 381 U.S. at 458-459. In *Cummings*, the Court disagreed that a disability or restraint only exists when the sanction involves physical restraint on the individual. *Cummings*, 71 U.S. at 322. The Court recognized that restraint takes many forms and "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment. . . . " *Id.* Moreover, the Court noted that counsel for the government did not include within his definition of liberty, freedom from outrage on the feelings, and the Court held that deprivation of rights or privileges vested under prior law could constitute punishment. *Id.* The most important determinative factor was "the circumstances attending and the causes of the deprivation." *Id.*

Here, the Does had a right under Alaska law to reintegrate into society and to be left alone. *Abraham*, 585 P.2d at 531. This right is fundamental and protected by the Due Process Clause of the 14th Amendment. *Ferguson*, 816 P.2d at 139-140. Moreover, the Does had the right to unconditional release after service of their sentences and the right to have all their civil rights restored. *Alaska Stat.* 33.30.241, *Alaska Stat.* 12.55.185(15). Compelling the Does to register, coupled with the imposition of conditions such as the duty to report a change of residence, a

change in employer, hair color, type of vehicles, etc., all deprives them of rights and privileges existing under prior law. The circumstance attending a deprivation of these rights is the State's desire to fulfill one of the stated goals of penal administration in Alaska, and the cause of the deprivation is the prior conviction because the ASORA only applies after conviction for a sex offense. *Alaska Stat.* 12.63.100 (1998).[16]

Pasting a scarlet letter on the offender through public notification places the offender at risk of violence, and clearly imposes an affirmative disability and restraint. Examples of violent community response continue to mount and add to the reams of evidence which weigh heavily against criminal registration and public notification. *Jerusalem: A Framework for Post-Sentence Sex Offender Legislation, "Perspectives on Prevention, Registration, and the Public's 'Right' to Know,"* 48 Vand. L. Rev. 219, 245-46 (1995). This retributive, stigmatizing community environment has the opposite effect of rehabilitative

[16] The fact that the panel may have relied on a misstatement of Alaska law, is respectfully irrelevant. *Pet. Br. 39-40.* The fact remains that the ASORA vests exceedingly broad discretion regarding the manner in which it may be implemented, and it does not foreclose forced in-person registration or even unannounced visits to the registrant's home address. *Id.* Indeed, the asserted purpose of the ASORA is to collect and disseminate truthful information to the public. *Pet. Br. 25.* The government cannot insure truthfulness without seeking to verify the information. Verification would have to come in the form of inspecting vehicles to determine whether the identification numbers provided are accurate, interviewing relatives to determine whether other vehicles are at the registrant's disposal, and verifying home addresses, etc. In light of the broad discretion conferred by the ASORA, nothing stops the department from latter adopting a regulation that requires in-person reporting. *Alaska Stat.* 12.63.010(d)(2) (1998).

treatment, which is the second proposed policy goal of these registration laws. *Id.* Public notification laws have created an atmosphere where vigilantism, and public condemnation is the norm, rehabilitation is the exception. *Silva: Dial, 1-900-PERVERT, and Other Statutory Measures That Provide Public Notification of Sex Offenders*, 48 SMU. L. Rev. 1962, 1983-84 [1995]. Under the guise of protecting the public, these laws have been the cause of homes being burned, *id.*, at 1983; of beatings, and of families being run out of town. *Id.*, at 1983-1984. Even small children have been harassed merely because their parent was once convicted of crime. *Id.*, p. 1984. Empirical studies show that these laws do not protect the public, they do not reduce the incidence of crime and in fact, they may be part of the cause of the recent rise in criminal activity. *Id.*, pp. 1979-1980. *See also Note: Battling Sex Offenders: Is Megan's Law An Effective Means Of Achieving Public Safety?*, 19 Seton Hall Leg. J. 519, at 546-549 (1995). Finally, there are ever increasing reported incidents of the wrong person being attacked because the public believed a criminal lived at that address. *Id.*, pp. 558-560. The empirical evidence continues to mount and these case histories show that these offense-based registration and public notification laws do indeed impose an affirmative disability and restraint. *See generally, Brief of New Jersey Public Defender Agency As Amicus Curiae.*

Factor 2, Whether the sanction has historically been regarded as punishment.

Public notification, shaming, ostracism, and community obloquy have historical roots and have traditionally been nothing but punishment. *A. Earle, Curious Punishments of Bygone Days,* 1-2 (1896) (Applewood reprint 1995).

The lower court erred in concluding otherwise. *Pet. App. 18a*. While it is true that regulatory laws are not historically regarded as punishment *Pet. Br. 35*, that truth does not stand where the law regulates the individual, rather than an activity.

Earle, a social historian of the 19th Century noted that "our far-away grandfathers" were most afraid of ridicule and this sensitiveness which made a "lampoon, a jeer, a scoff, [or] a taunt, an unbearable and inflaming offense was of equal force when used against men of the day in punishment for real crimes and offenses." *Id.* Earle's historic account of punishment shows that "contemptuous publicity and personal obloquy" was incorporated into all forms of punishment, and that public exposure as well as public mocking by the whole community was thought to be the most effective form of punishment. *Id.*, at 3. Moreover, the motivation for imposition of publicity and public exposure as a form of punishment is nearly identical to the reasons given for these offense-based Megan's laws – because the public wanted to know who were the criminals, and where they could be found. *A. Earle*, at 87. It was "characteristic of the times," every little community sought to know the offenses and offenders that could hinder the growth and prosperity of their new communities. *Id.*

Not only is publicity regarding one's crime historically regarded as punishment, but forced registration itself has punitive roots – although the historic form of that registration was somewhat different than the modern day computer database. In those historic times discussed by *Earle*, forced registration took the form of wearing a badge that gave the information required, such as the place of residence. *A. Earle*, pp. 89-90.

In more recent times, registration of criminals was never thought to be anything other than punishment. *Note: Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. of Pa. L. Rev. 60, 61 (1954). This 1930's attempt at criminal registration was not unlike the current trend. Conviction of a crime was the single element that triggered the application of these laws to the individuals affected. *Id.*, at 65. Additionally, the conviction for the covered offenses would trigger the duty to register, regardless of the jurisdiction in which the conviction occurred. *Id.*, at 68, 75. These outdated criminal registration laws required those persons to be fingerprinted, photographed, and they required reports as to the changes in one's residence. *Id.* Like the ASORA, these registration laws all carried significant penalties that could be imposed upon those persons who failed to comply with the registration requirements. *Id.*, at 79. Unlike the ASORA, however, these registration laws were never touted as being anything other than punishment. *See In re Allen Eugene Reed on Habeas Corpus*, 663 P.2d 216, 218 (California 1983).[17]

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[17] Citing: *In re Birch*, 515 P.2d 12 (California 1973) wherein the Court vacated a guilty plea because the defendant had not been advised of his right to counsel and had not been informed that, as a result of his conviction, he would be required to register as a sex offender. The court in *Reed* quoted Justice Tobriner, who wrote the opinion in *Birch*. He concluded that "[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for life." *Reed*, at 218. Respondents are confident that if asked, the sex offender would rather spend more time in prison as opposed to a lifetime of scorn and obloquy.

Clearly, registration of convicted offenders and public notification about their crimes must be historically regarded as punishment, and nothing but punishment

Factor 3, Applies only upon a finding of scienter.

The ASORA applies only after conviction for a sex offense and thus, applies only after a finding of scienter. In adopting this element of the effects test, this Court intended a finding of scienter if the intent, bad faith or knowing conduct of the party was at issue in the original crime to which the new sanction is applied. *Mendoza-Martinez*, 372 U.S. at 169 n.24, *citing Helwig*, 188 U.S. at 610-612. In *Helwig*, the sole question presented was whether a statute, which imposed an additional monetary payment for importations constituted a penalty. *Helwig*, 188 U.S. at 611. In reaching its conclusions, the Court held that there could be no question that the statute in question imposed a penalty, "[i]t is because of the action of the importer with relation to the importation in question" that the sanction is applied. *Id.* Thus, if the offense triggers application of the statute, the sanction only comes about upon a finding of scienter. It is not true that scienter can only be found if the ASORA itself requires such a finding, and the underlying offense triggering the ASORA is relevant. *Pet. Br. 36.*

The lower court based its conclusion on interpretation of Alaska's sexual abuse statutes, and the lack of any "intent" requirement. *Pet. App. 18a.* However, scienter can include bad faith or knowing conduct. *See Kurth Ranch*, 511 U.S. at 774. In Alaska, knowing conduct is an element of sexual abuse. *See Van Meter v. State*, 743 P.2d 385, 389

(Alaska App. 1987). Because scienter is an element of the crime triggering the ASORA's application, the ASORA operates upon a finding of scienter.

Factor 4, Whether the ASORA promotes the traditional aims of punishment – retribution and deterrence.

The ASORA promotes traditional aims of punishment – retribution and deterrence. *Pet. Br. 44, Pet. App. 21a.* The lower court found the ASORA primarily retributive because of the lifetime registration requirement, quarterly verification of the same information four times per year, excessive notification and because there was no way to escape the ASORA's effect, and not merely because of a misstatement of the law. *Pet. App. 21a.* Here, petitioners admit that the ASORA is intended to deter future crime, although they wrongly contend that retributive and deterrent goals are insufficient to classify the ASORA as penal. *Pet. Br. 44, See Kurth Ranch, supra* (law was penal due to its excessive effect and deterrent goals).

Factor 5, Whether the ASORA applies to conduct which is already a crime.

This factor is highly relevant to the Ex Post Facto inquiry. *Pet. Br. 44-45.* It makes little difference whether double jeopardy or retroactive punishment is at issue, the question to be answered is whether the law is criminal, and not civil. *Hudson*, 522 U.S. at 93-94. Thus the question whether the ASORA applies to behavior which is already criminal is relevant to this inquiry. *Pet. Br. 44-45.* That question must be answered in the positive because

the ASORA only applies after conviction for a sex offense. Hence, it applies only to conduct which is already a crime.

Factor 6, Whether an alternative purpose may rationally be assigned .

The alternative purpose assigned by the legislature is protection of the public through deterrence of future sex offenses. *Pet. Br. 37, 44*. Although, this alternative purpose is valid, and rational, it does not compel the conclusion that the ASORA is civil rather than penal. *New York v. Burger*, 482 U.S. 691, 693, 712 (1987). Regulatory laws may have the same purpose as penal laws, but regulatory laws are generally distinguishable because they are narrowly drawn to accomplish the stated purpose. *Id.* Thus, although the lower court held that a valid alternative purpose could be assigned to the ASORA, this factor should be given little weight in determining whether the ASORA is penal or civil. *Pet. App. 23a*. It is respectfully asserted that protection of the public through deterrence of future criminal behavior is a constitutionally insufficient purpose to justify such a broad offense-based registration and public notification law that labels the individual with a badge of infamy. At best, the alternative purpose assigned to the ASORA is ambiguous. Hence, evaluation of the ASORA under this factor does not compel the conclusion that the ASORA was intended to be civil.

Factor 7, Whether the ASORA is excessive in relation to its assigned purpose.

In determining whether the ASORA is excessive in relation to its asserted purpose, comparison of the ASORA to laws which regulate the qualifications for the practice of

medicine is completely unreasonable. *Pet. Br. 46, citing, Hawker.* Moreover, it is unreasonable to compare the ASORA to the civil remedial statutes challenged in *Hendricks*, because the ASORA provides no procedure whatsoever to determine future dangerousness based on current evidence. *Pet. Br. 47*. The ASORA does that, which this Court in *Hendricks* said should not be done – it predicts future dangerousness based solely on the past conviction. *Hendricks*, 521 U.S. at 360.

The question whether the ASORA is excessive is not more pertinent to a due process inquiry because the process due under a particular statute depends upon whether the statute in question is regulatory or penal. *Pet. Br. 47-48. Cf., United States v. Salerno*, 481 U.S. 739, 746 (1987). Furthermore, where fundamental rights are abridged by the challenged act, the State must do more than show a reasonable relationship between the purpose and the means employed to achieve the desired purpose. *Pet. Br. 48.* Instead, the State must show both a compelling State interest and that the Act is narrowly tailored to achieve that compelling interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

In this instance, fundamental rights are infringed and the legislature knew that to be true when the ASORA was enacted – the legislative findings recognized a specific right of privacy and recognized that the right of privacy was being infringed by the ASORA. *1994 Alaska Sess. Laws, ch. 41, § 1*. Additionally, the right to rehabilitation and reintegration, which is a right protected by due process in Alaska, is infringed as are other rights discussed previously herein. *Ferguson,* 816 P.2d at 139.

Hence, petitioners have the burden of showing that the ASORA is narrowly tailored to meet the goal of protection of the public through deterrence of future conduct.[18]

The registration provisions of the ASORA are excessive in relation to the alternative purpose assigned because if a registrant provides the myriad of information demanded under the ASORA, and all of the information is accurate and does not change, then why should the individual be forced to provide the same information four times per year for the rest of his life? The only purpose for demanding that the registrant provide the same information, four-times per year for the rest of his life and to, each time, swear upon oath that it is true, is to punish. There could be no other legitimate purpose for such a demanding provision.[19]

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[18] Recognizing the impossibility of this task, petitioners attempt to export the excessiveness inquiry back to the lower court, so the lower panel can determine whether the ASORA violates due process. *Pet. App. 66a* (the lower panel did not decide the due process question because it found it unnecessary in light of its decision that the ASORA could not be applied retroactively to the Does). *Id.* However, this factor is highly relevant in determining whether the ASORA is excessive in light of its assigned purpose, and whether it should be classified as penal, rather than civil. *Hendricks, supra.*

[19] Reliance on the Jacob Wetterling Act, 42 U.S.C. § 14071, as a basis for requiring quarterly reporting is misplaced because that Act requires a finding by a court that the individual is a sexually violent predator, or a similar finding through constitutionally adequate and approved procedures. *64 Fed. Reg. 572, 574 (1999).* The government is correct in asserting that States are free to determine which offenders are potentially dangerous; however, the Federal Act clearly requires some type of "procedure" being employed to do so, it does not envision a legislative determination that everyone convicted of a sex offense is a sexually violent predator. *Brief for the United States as Amicus Curiae, pp. 8-10. See 64 Fed. Reg. at 574.* More importantly, the Federal Act does not envision delegation of that determination to the untrained and

(Continued on following page)

The stated goals of the ASORA are far outweighed by the stigmatic and punitive effects associated with forced registration and public notification.[20] Indeed, the empirical evidence shows that in attempting to protect the public, these offense-based Megan's laws put a large segment of the public at substantial risk. *Brief of New Jersey Pubic Defender Agency as Amicus Curiae. See also CR 107, Exhibit 9-11, CR 101, Exhibit 12-16.* That portion of the public who may be housing registrants, providing employment to registrants, or related to registrants by blood or marriage are clearly at substantial risk solely because of the State's action. The assertion that the cause of vigilantism against innocent members of the public is public response and not State action lacks merit. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). "[I]t is only after the initial exertion of state power represented by the . . . [disclosure], that private action takes hold." *Id.*

In attempting to protect the public through deterrence of future conduct, the ASORA violates fundamental rights, lacks procedures for determining future dangerousness, impedes the ability to find and maintain a home, interferes with the ability to seek and maintain employment,

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reactive public, but that is what Alaska did according to testimony by the Assistant Attorney General when he described his personal experiences. *Resp. App. 8a-9a.* Moreover, the federal act does not require that states apply these registration laws retroactively. *Id.*, at 575, 581.

[20] In making this inquiry the Court is free to examine the effect as evidenced by the actual consequences brought about by application of the ASORA. *Lynce*, 519 U.S. at 441. The Court is not limited to hypothetical effects deemed possible solely by an examination of the statutory provisions.

invades the personal relationships of the registrant, and places the registrant, their families and other members of the public at substantial risk of vigilantism. *CR 107, Exhibits 9-11, CR 101, Exhibits 12-16; Brief of New Jersey Public Defender As Amicus Curiae.* The ASORA labels the offender with a badge of infamy, a label expositive of the crime and tells the public the individual is dangerous and should be ostracized into an inner-community banishment as a new class of citizen.

The ASORA is also excessive because it operates to infringe upon fundamental liberties of persons convicted of a sex offense who pose no threat whatsoever to the public. *See McKune v. Lile*, ___ U.S. ___, 122 S.Ct. 2017, 2024 (2002). Although the rate of recidivism for sex offenders varies depending upon the number of, and category of sex offender studied, *see generally, Brief of N.J. Public Defender, As Amicus Curiae; Brief of United States, As Amicus Curiae,* it is reasonable to conclude that the average recidivism rate is less than 20 percent. *Id.* Even if the government's asserted rates are considered, that means that 50 to 80 percent of the individuals compelled to register and labeled for life are not likely to re-offend and do not pose a threat to public safety. *See Brief of United States As Amicus Curiae.* In Alaska, thousands of individuals, including family, friends, employers, and associates of the registered offender, are unnecessarily subjected to the harmful and punitive effects of the ASORA. Nationally, hundreds of thousands of lives will be destroyed if this Court sanctions enactment and enforcement of broad-based registration and notification laws like the ASORA. Nearly every sex offender and public notification law upheld by the federal courts have tailored the provisions imposed to the actual risk posed by the offender.

See Cutshall v. Sundquist, 193 F.3d 466, 474 (6th Cir.1999); *Roe v. Office of Adult Probation*, 125 F.3d 47, 54 (2d Cir.1997); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir.1997); *Doe v. Pataki*, 120 F.3d 1263, 1269-70 (2d Cir.1997). Rather than have professionals assess the degree of risk, Alaska chose to let the untrained, uninformed public, some of whom will and have engaged in vigilantism, make that determination for themselves. *Resp. App. 8a-9a.* Because the ASORA applies to all persons previously convicted, regardless of degree of risk actually posed, it imposes its stigmatizing effect on persons who pose no threat to the public, and it is excessive in relation to the assigned purpose of protecting society through deterrence of future conduct. *See Salerno*, 481 U.S. at 747-749.

CONCLUSION

Objective examination of the ASORA evidences intent that the ASORA is a criminal law. Alternatively, six out of the seven *Mendoza-Martinez* factors weigh heavily in classifying the ASORA as criminal. The ASORA has increased the period of supervision for persons convicted of sex offenses, it operates retroactively to crimes committed before its effective date, and it increases the punishment for past offenses. The ultimate conclusion of the Court of Appeals for the Ninth Circuit, that retroactive application

of the ASORA is barred by the Ex Post Facto Clause, must be affirmed.

Respectfully submitted,

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No. 01-729

In The
Supreme Court of the United States

GLENN G. GODFREY and BRUCE BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SENATE BILL 238

IN THE LEGISLATURE FOR THE STATE OF ALASKA

NINETEENTH ALASKA LEGISLATURE – SECOND SESSION
(Introduced 01/24/1996).

A BILL
FOR AN ACT ENTITLED

"An Act relating to the care and regulation of the care of animals; relating to registration of animal abuse offenders; and relating to crimes involving animals."

Section 1: *AS 03.53* is amended by adding new sections to read:

Sec. 03.53.150. ANIMAL ABUSER REGISTRATION. (a) An animal abuser who is physically present in the state shall register with the department as provided in this section. The animal abuser shall register within

(1) seven days of release from an in-state correctional facility;

(2) seven days of conviction for a violation of an animal abuse offense if the animal abuser is not sentenced to a term of incarceration; or

(3) 14 days of becoming physically present in the state.

(b) An animal abuser required to register under (a) of this section shall register by mail or in person at an office of the department. To fulfill the registration requirement, the animal abuser shall complete a registration form that includes, at a minimum, the animal abuser's name, address, place of employment, date of birth, each conviction for an animal abuse offense for which the duty to

register has not terminated under this section, date of animal abuse offense convictions, and place and court of animal abuse offense convictions, all aliases used, and driver's license number.

(c) If an animal abuser changes residence within the state after having registered under (a) of this section, the animal abuser shall provide written notice of the change to the department office located nearest to the new residence within 10 days of the change.

(d) The duty of an animal abuser to comply with the requirements of this section for each animal abuse offense ends 10 years following the animal abuser's unconditional discharge from a conviction for an animal abuse offense.

Alaska Statute, 12.85.010 (1962).

The provisions of this title apply to all criminal actions and proceedings in all courts except where specific provision is otherwise made or where the Rules of Criminal Procedure adopted by the supreme court under its constitutional authority apply. This title governs all proceedings in actions brought after January 1, 1963, and all further proceedings in actions then pending, except to the extent that, in the opinion of the court, their application in a particular action pending when the rules take effect would not be feasible, or would work injustice, in which event, the laws in effect before January 1, 1963, apply.

Alaska Statute, 12.85.020 (1962).

This title may be cited as the Code of Criminal Procedure.

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REPLY BRIEF FOR PETITIONERS

I. THE LEGISLATURE'S EXPRESS INTENT WAS REGULATORY.

1. The Alaska legislature's regulatory intent in passing the ASORA is plain on the face of the Act. In the Act's statement of findings, the legislature concluded that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the public from sex offenders is a primary governmental interest," that the government's interest in public safety outweighs offenders' privacy interests in certain truthful information, and that releasing that information to the public "will assist in protecting the public safety." 1994 Alaska Sess. Laws ch. 41, § 1. The Act's statement of purpose makes clear that the legislature's animating concern was protecting the public from a group of

offenders that it concluded posed an appreciable risk of recidivism. *See* Pet. Br. 5-6, 24-26. The Ninth Circuit below correctly concluded that the legislature "acted with a non-punitive intent" in enacting the statute, joining every other court to have considered an ex post facto challenge to a sexual offender registration and notification law. Pet. App. 11a; *see* Pet. Br. 23-24 n.11.[1]

2. Respondents nonetheless argue that the Alaska legislature acted with punitive intent in enacting the ASORA, because its registration provisions (but not its notification provisions) are codified in Title 12 of the Alaska Code, titled "Criminal Procedure." Resp. Br. 25. But the placement of the ASORA's registration provisions in Title 12 says nothing about the legislature's intent. *See* Pet. App. 11a (rejecting argument that inclusion of registration provisions in criminal code signaled an intent to punish); *see also Patterson* v. *State*, 985 P.2d 1007, 1012 (Alaska Ct. App. 1999) (placing the ASORA, a "by-product of a sex offender's conviction," in Title 12 "does not indicate that the legislature had a punitive intent"). Title 12 contains many other provisions that do not involve criminal punishment, including civil procedures for disposing of recovered and seized property, Alaska Stat. §§ 12.36.010 *et seq.*; laws protecting the confidentiality of victims and witnesses to a crime, *id.* §§ 12.61.010 *et seq.*; laws governing the security and accuracy of criminal justice information, *id.* §§ 12.62.110 *et seq.*;

[1] Respondents argue that the legislature's "subjective motivations" should not drive the Ex Post Facto Clause inquiry. Resp. Br. 16, 23-24 n.13. They are right. We have argued from the outset that the Ex Post Facto Clause demands not an examination of the legislature's subjective "motive"—and particularly not the motive of individual legislators, *see* Resp. Br. 23-24 n.13—but an objective inquiry into the *expressed* intent of the legislature, which can be overridden only by overwhelming evidence of the law's punitive effects. It is respondents, not we, who advocate going behind the legislature's express statements.

laws governing civil post-conviction actions, *id.* §§ 12.72.010 *et seq.*; and actions for writs of habeas corpus, *id.* §§ 12.75.010 *et seq.*, which under Alaska law are "independent civil proceeding[s]." *State* v. *Hannagan*, 559 P.2d 1059, 1063 (Alaska 1977). The mere inclusion of the registration provisions in Alaska's criminal code thus in no way detracts from the legislature's express statements of regulatory purpose.[2]

3. Respondents also argue that the ASORA was enacted with punitive intent because defendants charged with covered offenses must be informed about the "registration and public notification provisions" of the ASORA before entering guilty pleas, and judgments of conviction must "includ[e] the registration and public notification provisions as part of the written judgment." Resp. Br. 6 (citing 1994 Alaska Sess. Laws ch. 41, §§ 10-11); *id.* at 27. To begin with, respondents are only half right; courts must notify defendants pleading guilty to, and those convicted of, qualifying sex offenses of the Act's registration requirements only. *See* Alaska R. Crim. Proc. 11(c)(4) (court may not accept plea to qualifying sex offense without first "informing the defendant in writing of the requirements of AS 12.63.010 [the registration provision] and, if it can be determined by the court, the period of

[2] *See Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (location of Tennessee sex offender registration and notification law in criminal code did not warrant finding that the law was intended to punish), *cert. denied*, 529 U.S. 1053 (2000); *Doe* v. *Pataki*, 120 F.3d 1263, 1277-78 (2d Cir. 1997) (location of New York sex offender statute in "Corrections Law" volume of the state code did not "suggest[] that the legislature sought to punish sex offenders for their past offenses rather than to prevent any future harms that they might cause"), *cert. denied*, 522 U.S. 1122 (1998); *see also United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364-365 (1984) (Congress intended forfeiture to be a civil sanction, even though statute authorizing forfeiture was located in criminal code).

registration required"); Alaska Stat. § 12.55.148 (written judgment of conviction "must set out the requirements of AS 12.63.010 and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register for life or a lesser period").

And in any event, the fact that the legislature chose to notify convicted offenders or those considering pleas about the registration requirements does not render the requirements themselves punitive. Rather, because a registrant's *willful* failure to register carries a criminal penalty, notice of the requirements satisfies the willfulness prerequisite to any subsequent prosecution for failure to register. *See* Alaska Stat. §§ 11.56.835, 11.56.840; *see also id.* § 28.05.048 (requiring state Department of Motor Vehicles to "display notice of the registration requirements * * * at a place where the public may apply for a driver's license, identification card, or vehicle registration"). *Cf. Lambert* v. *California*, 355 U.S. 225, 229 (1957) (person could not be convicted of failure to register as convicted felon absent prior knowledge of duty to register). Such a later prosecution, of course, would not violate the Ex Post Facto Clause because it would be based prospectively on a failure to comply with the ASORA.

4. Finally, respondents repeatedly argue that the ASORA was intended to punish sex offenders because the legislature improperly "focused on the group of persons to whom the ASORA applies, and not on an activity from which these persons should be barred due to relevant past conduct." Resp. Br. 26; *see also id.* at 14, 16, 18, 19, 20, 21, 22, 34. According to respondents, because the ASORA is not aimed at prohibiting offenders from participating in a particular activity or profession, such as working in the banking industry, *Hudson* v. *United States*, 522 U.S. 93 (1997), holding union office, *De Veau* v. *Braisted*, 363 U.S. 144 (1960), or practicing medicine, *Hawker* v. *New York*, 170

U.S. 189 (1898), the law violates the Ex Post Facto Clause. *See* Resp. Br. 21-22.

That is wrong. First, regulatory laws may impact individuals without regard to their membership in any discrete "activity" or profession. Indeed, in *Kansas* v. *Hendricks*, 521 U.S. 346, 371 (1997), the Court held that a law permitting indefinite confinement of a subclass of sex offenders did not violate the Ex Post Facto Clause, because the confinement served valid regulatory purposes. *See also Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952) (deportation of legal resident aliens based on past Communist Party membership did not violate Ex Post Facto Clause); *cf. United States* v. *Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001) (law prohibiting felons from possessing firearms did not violate Ex Post Facto Clause).

Second, the laws respondents classify as regulating "activities" are better understood as responding to threats of harm of a localized scope and magnitude. New York passed the law challenged in *Hawker*, prohibiting convicted felons from practicing medicine, in order "to protect its citizens from physicians of bad character." 170 U.S. at 196. The legislature enacted the law at issue in *De Veau*, prohibiting felons from holding office in waterfront unions, as part of a "much-needed scheme of regulation" of New York's famously corrupt waterfront, after receiving "evidence that the presence on the waterfront of ex-convicts was an important contributing factor" to the corruption. 363 U.S. at 160; *see id.* at 158. And the order challenged in *Hudson*, which debarred the felon-petitioner from working in the banking field, was designed to "promote the stability of the banking industry." 522 U.S. at 105.[3]

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[3] *See also DeHaine* v. *Pena*, 32 F.3d 1066, 1069 (7th Cir. 1994) (presidential directive barred former air traffic controllers who had participated in 1981 strike from employment with Federal Aviation Administration, on grounds that it would be "detrimental

Each law above was found to be non-punitive because it was a rational regulatory response to a perceived threat of harm—or as the Court put it in *De Veau*, a "relevant incident to a regulation of a present situation." 363 U.S. at 160. That was so even though the laws applied only to people based on their status as convicted felons. In contrast, a law will be found to be improperly punitive when, rather than "regulat[ing] * * * a present situation," the law "bears *no rational connection* to the purposes of the legislation of which it was a part." *Flemming* v. *Nestor*, 363 U.S. 603, 616 (1960) (emphasis added). The Court in *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866), for example, struck down a law requiring clergymen and other professionals to swear their support for the Union after finding that the law was not "a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged"; rather, the law was manifestly intended to punish Confederate sympathizers. *See Dent* v. *West Virginia*, 129 U.S. 114, 126 (1889) (law in *Cummings* struck down because "many of the acts from which the parties were obliged to purge themselves by the oath had *no relation* to their fitness for the pursuits and professions designated") (emphasis added).

The legislature in this case concluded that the potential harm posed by Alaskan sex offenders after their release from prison was directed not just at one profession, one industry, or any one uniquely sensitive field. The potential harm is of a larger scale, because the potential for sex offenders to re-offend exists in the community at large. The legislature's decision to require offenders to register and to make registry information available to the public has a rational connection to promoting community safety, and thus is a legitimate

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to the efficiency of operations at the [FAA] and to the safe and effective performance of our national air traffic control system"), *cert. denied*, 514 U.S. 1050 (1995).

"relevant incident to [the] regulation of a present situation." *De Veau*, 363 U.S. at 160. *See Hendricks*, 521 U.S. at 363 (approving indefinite civil detention of dangerous sex offenders "for the purpose of protecting the community from harm"). If the ASORA is of greater scope than the laws in *Hawker* or *De Veau*, it is only because of the broader scope of the threat that the legislature determined existed. *See* Pet. Br. 24-26 & nn.12-14.

II. THE ASORA'S EFFECT IS NOT PUNITIVE.

The legislature's plainly regulatory intent can be defeated only if respondents carry the "heavy burden" of showing by the "clearest proof" that the effects of the ASORA are punitive. *Hendricks*, 521 U.S. at 361; *see United States* v. *Ward*, 448 U.S. 242, 249 (1980).[4] Respondents correctly recognize that the seven *Mendoza-Martinez* factors are best viewed as "guideposts," and also correctly acknowledge that some of those factors "might be more important than others." Br. 19, 29. But they are quite wrong in suggesting that "any

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[4] Respondents avoid that demanding standard whenever they can, instead invoking familiar phrases from other, unrelated constitutional precedents to support their arguments. *See, e.g.*, Resp. Br. 28 (arguing that the ASORA must be "narrowly tailored to achieve the stated purpose" to survive an ex post facto challenge); *id.* at 38 (same). Those catchphrases have no place here. The proper inquiry, as this Court has repeatedly held, is whether there exists "*unmistakable evidence*" of punitive effect sufficient to override the legislature's statement of regulatory intent. *Flemming*, 363 U.S. at 619 (emphasis added). Respondents suggest that the standard is actually "nothing more than the legal maxim that statutes enjoy a presumption of constitutionality." Resp. Br. 17. But as this Court explained in *Flemming*, the "clearest proof" standard reflects the Court's traditional deep reluctance to look beyond objective manifestations of legislative intent to determine whether an improper purpose lies behind a statute, in addition to the presumption of constitutionality that traditionally informs statutory analysis. 363 U.S. at 617; *id.* at 619.

one of the [*Mendoza-Martinez*] factors, or any combination of two or more, demonstrates that the ASORA is excessive." *Id.* at 20. In fact, as we explained in our opening brief, this Court has *never* found that the *Mendoza-Martinez* factors, in any permutation, overrode a legislature's regulatory intent. *See* Pet. Br. 32 & n.19. That is one of the reasons the Ninth Circuit's decision is so remarkable; and it is all the more remarkable that the court reached that decision after finding three of the seven factors to favor the conclusion that the ASORA is not punitive. *See* Pet. App. 29a-30a.

Attempting to widen the margin of the Ninth Circuit's close call on the *Mendoza-Martinez* factors, respondents now challenge the three factors that the court found supported the conclusion that the ASORA was regulatory.

Historical Punishment. Along with every other circuit to have considered the issue, the Ninth Circuit found that sex offender registration and notification statutes bear no resemblance to historical punishments.[5] Pet. App. 18a. Undaunted by the courts' unanimous view, respondents, joined by their amicus the District of Columbia Public Defender Service, argue at length that the ASORA is indistinguishable from colonial "humiliatory" punishments. Resp. Br. 33-36; D.C. Pub. Def. Br. 17-24. Their arguments actually underscore the differences between contemporary sex offender laws and antiquated shaming penalties.

Respondents argue that the ASORA has a punitive pedigree because "shaming, ostracism, and community obloquy have historical roots and have traditionally been nothing but punishment." Resp. Br. 33. *See* D.C. Pub. Def. Br. 20-21

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[5] *See Femedeer* v. *Haun*, 227 F.3d 1244, 1250-51 (10th Cir. 2000); *Russell* v. *Gregoire*, 124 F.3d 1079, 1089 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998); *Doe* v. *Pataki*, 120 F.3d at 1283; *E.B.* v. *Verniero*, 119 F.3d 1077, 1099 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).

(citing Alice M. Earle, *Curious Punishments of Bygone Days* (1896) (Applewood reprint 1995)). That is only half the story.

> In many—indeed, in nearly all—of the penalties and punishments of past centuries, derision, scoffing, contemptuous publicity and personal obloquy were applied * * * by means of demeaning, degrading and helpless exposure in grotesque, insulting and painful "engines of punishment," such as the stocks, bilboes [leg shackles], pillory, brank [a metal cage for the head with a built-in gag], ducking-stool or jougs [iron collars fastened to a wall]. [Earle, *supra*, at 2-3.]

Whatever incidental embarrassment the ASORA visits on convicted sex offenders, the means by which it does so—registration and reporting—in no way resemble the "engines of punishment" colonial societies "in nearly all" cases used to elicit public contempt and obloquy. *Id.*

Still respondents argue that while bilboes, branks, and similar devices may have been the principal methods by which shaming punishments were administered, at least some punishments did not "involve[] infliction of physical pain," such as where "offenders were required simply to stand in public with signs cataloguing their offenses." D.C. Pub. Def. Br. 21 (quotation omitted). But this, too, misses the mark; the defining feature of all these ancient punishments was not pain, but a government-compelled *physical presence* before the community. *See E.B.* v. *Verniero*, 119 F.3d at 1099 ("these colonial practices inflicted punishment because they * * * *physically held* the person up before his or her fellow citizens for shaming") (emphasis added).

The government-compelled physical presence that was the hallmark of these early humiliatory punishments is entirely absent from modern registration and reporting regimes like the ASORA. Nowhere in their brief do respondents argue otherwise. The D.C. Public Defender Service, for its part,

suggests that the analogy is satisfied because sex offenders are "required to 'physically' present themselves to provide the information and sit for the photographs" that are added to the registry. D.C. Pub. Def. Br. 23. But reporting to a government agency outside the public eye is nothing close to being physically paraded before "the free gibes and constant mocking of the whole community." Earle, *supra*, at 3. Nor does the Public Defender Service get anywhere by characterizing the Internet registry as a "cyber-confrontation," Br. 3, because it is not a "confrontation" at all; the offender is not present for it. *See Doe* v. *Pataki*, 120 F.3d at 1284 ("traditional shaming penalties * * * enlisted the offender's physical participation in his own degradation").

Finally, the primary purpose of the ASORA's registration and reporting requirements is entirely distinct from the goal of humiliatory punishments. As the Public Defender Service notes, the "essence" of shaming penalties was just that: to inflict "public disgrace." Br. 21; *see also Doe* v. *Pataki*, 120 F.3d at 1283 (stigmatization penalties "primarily served distinctly punitive goals"). By contrast, the ASORA's animating purpose is "protecting public safety." 1994 Alaska Sess. Laws ch. 41, § 1. *See also Russell*, 124 F.3d at 1092 (Washington law "is not intended to be punitive—it has protective purposes—while shaming punishments were intended to and did visit society's wrath directly upon the offender") (internal quotation omitted). That Alaska's registration and notification methods may, from time to time, embarrass registered offenders is wholly incidental to the government's legitimate regulatory interests. Governments have often provided truthful information regarding criminal records to people who choose to access it in order to better protect themselves and others. Such actions have never been considered additional "punishment" for the crime. A ruling to the contrary would improperly remove a critical tool for protecting public safety.

Scienter. *Mendoza-Martinez* directs courts to inquire whether the sanctions challenged as punitive—here, registration and notification—"come[] into play only on a finding of scienter." 372 U.S. at 168. The correct question under this inquiry is whether the ASORA " 'on its face' " contains a scienter requirement. *Hudson*, 522 U.S. at 104 (quoting *Mendoza-Martinez*, 372 U.S. at 169). The ASORA contains no such requirement; the plain fact of conviction triggers the statute's registration and public notification requirements. *See Femedeer*, 227 F.3d at 1251; *Cutshall*, 193 F.3d at 475.

Alternative, Non-Punitive Purpose. The "[m]ost significant" *Mendoza-Martinez* factor is whether the law has an alternative, non-punitive purpose that can rationally be assigned to it. *United States* v. *Ursery*, 518 U.S. 267, 290 (1996); *Russell*, 124 F.3d at 1091. The ASORA certainly does: it protects public safety. The Ninth Circuit correctly recognized as much, finding the Act's community-protection purpose to be the "principal support * * * for the view that the statute is not punitive." Pet. App. 23a.

Even respondents recognize that the ASORA's non-punitive purpose is "valid[] and rational." Resp. Br. 38. They nonetheless argue that this crucial factor is of no moment here, because, in their view, the ASORA's alternative purpose is "ambiguous" and the law is not sufficiently "narrowly drawn." *Id.* (citing *New York* v. *Burger*, 482 U.S. 691, 693, 712 (1987)). The former objection is answered by the Ninth Circuit's unequivocal conclusion that the ASORA's intended purpose was regulatory. *See* Pet. App. 12a. And the latter objection makes no sense. The Court in *Burger* did not remotely address the questions at issue here, nor did it hold that regulatory laws *must* be drawn narrowly. To the contrary: "The legislature is not required to act with perfect precision" when regulating, "and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction." *Doe* v. *Pataki*, 120 F.3d at 1283.

Respondents' arguments on the remaining *Mendoza-Martinez* factors contribute little beyond the Ninth Circuit's demonstrably flawed justifications for its ruling.

Affirmative Disability Or Restraint. The ASORA does not impose physical restraints on registrants and does not constrain registrants' freedom of movement. Nor does the law on its face or of its own force curtail their employment, housing, or educational opportunities.

Respondents do not dispute any of this. They have also abandoned the Ninth Circuit's erroneous and persistent statements that the ASORA's registration requirements require offenders to "register in person four times each year every year of their lives"—an error forming the centerpiece of the court's conclusion that the law imposed an "affirmative disability" and was "excessive." *See* Pet. App. 13a-14a, 7a, 19a, 20, 27a, 28a; Resp. Br. 32 n.16 (acknowledging that "the panel may have relied on a misstatement of Alaska law"). Respondents contend instead that the law imposes an "affirmative disability or restraint" because registrants are exposed to "community scorn[] and outrage" and because private citizens in the community might take unlawful action against them. *See* Resp. Br. 31-33, 41; D.C. Pub. Def. Br. 13-27; ACLU Br. 18-21; N.J. Pub. Def. Br. 6-21.[6]

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[6] Respondents also argue that the law imposes affirmative disabilities on them because it violates their state-law "right * * * to reintegrate into society and to be left alone." Resp. Br. 31. The ASORA does nothing to hamper those "rights." It simply requires offenders to register; it imposes no further constraints than that. Nor does the law violate respondents' expectation of privacy. *Id.* at 39. The legislature balanced offenders' privacy interests against the need to protect community safety and concluded that passive dissemination of limited, truthful information was necessary to protect the public welfare. *See Patterson*, 985 P.2d at 1016 (rejecting sex offender's claim that the ASORA violated his privacy interests).

The ASORA does not impose those consequences; they "(1) are wholly dependent on acts by private third parties, (2) result from information most of which was publicly available prior to the [Act], and (3) flow essentially from the fact of the underlying conviction." *Doe* v. *Pataki*, 120 F.3d at 1280; *see Meadows* v. *Board of Parole & Post-Prison Supervision*, 47 P.3d 506, 512 (Or. App. Ct. 2002) (unwelcome societal consequences "are the result of the offender's crimes and not of the designation and disclosure statutes"); *see also* N.J. Pub. Def. Br. 9, 15 (giving examples of negative community response to sex offender where *no* government-sponsored notification was conducted). As the Third Circuit recognized in *E.B.* v. *Verniero*, information relating to criminal convictions, publicized as a matter of course in our judicial system,

> may be the source of a wide range of adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism and/or vigilante retribution. Employment may be lost, and the opportunity for future employment may be dramatically reduced. * * * Nevertheless, our laws' insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such. [119 F.3d at 1100.[7]]

Nor does Alaska foster or condone unlawful attacks on registrants by making registry information available to the public by way of the Internet. Alaska's electronic registry, like others of its kind, contains a stern warning: "This information is made available for the purpose of protecting

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[7] It is also wrong to suggest that making a sex offender registry available to the public amounts to calling a sex offender a "state-certified menace." D.C. Pub. Def. Br. 18. Alaska's electronic sex offender registry publishes truthful information in an accessible medium. It also publishes that information *passively*: Those that wish to access the registry can take the steps necessary to do so; those that do not, can decline.

the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution." Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry*, http://www.dps.state.ak.us/nSorcr/asp (last visited August 29, 2002). And contrary to the New Jersey Public Defender's suggestion, Br. 11, the availability of prosecution against those who harass or injure registered offenders is not an empty threat. *See* PD 25a, 39-40 (lodged by N.J. Public Defender) (noting that two men were charged with assault after attacking a man believed to be a registered sex offender).

Respondents also claim that the ASORA and other such laws "do not protect the public" and may result in a "rise in criminal activity." Resp. Br. 33; *see also* N.J. Pub. Def. Br. 21; Mass. Comm. for Pub. Counsel Servs. Br. 18. How this supports their claim that the laws impose an "affirmative disability or restraint" on registrants is not immediately apparent. And respondents are wrong to boot: registration and disclosure statutes help prevent and solve crimes. *See* States' Amicus Br. 27-28; U.S. Br. 18 & n.15, 19-20 & n.17.

Traditional Aims Of Punishment. The ASORA's primary purpose is to protect public safety. *See* 1994 Alaska Sess. Laws ch. 41, § 1. Its registration and notification provisions are community safeguards; to the extent they may be said to "deter" crime, they do so by allowing members of the public to take precautions they may deem suitable, not by imposing additional potential penalties to discourage wrongdoers. And in any event, even if the ASORA may have the ancillary effect of deterring some sex offenders, that does not make it punitive: a deterrent purpose can "serve civil as well as criminal goals." *Ursery*, 518 U.S. at 292 (citing *89 Firearms*, 465 U.S. at 264, and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-678 (1974)); *see also Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) (civil "forfeiture * * * serves a deterrent purpose distinct from any punitive purpose").

Acknowledging that statutes like the ASORA may permissibly "implicate deterrence" without constituting unlawful punishment, the Ninth Circuit nonetheless concluded that the Act's purportedly "retributive" objective was the "primar[y]" basis for weighing this *Mendoza-Martinez* factor "on the side of finding the Act punitive." Pet. App. 19a. According to the court, the ASORA's registration provisions were "inherently retributive" because they required repeat or aggravated sex offenders to "report quarterly to their local police stations" for life, and other offenders to "go to the police station and register" once a year for fifteen years. *Id.* at 19a, 20a-21a.

Respondents now recognize that the Ninth Circuit may have relied on a "misstatement of Alaska law." Resp. Br. 32 n.16. They nonetheless argue that the provisions are "retributive" because "there [i]s no way to escape the ASORA's effect." The law's categorical application does not make it retributive. *See* Pet. Br. 46-47; *Hawker*, 170 U.S. at 197 (legislature could permissibly enact a "rule of universal application"). Respondents also suggest that retribution and deterrence alone could suffice to "classify the ASORA as penal," Resp. Br. 37, citing this Court's decision in *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767 (1994). But the Court in *Kurth Ranch* expressly stated that the deterrent effect of the high drug tax at issue there did not in and of itself render the tax punitive; rather, it was a rare "concoction of anomalies" that did that law in. *Id.* at 781, 783. Respondents acknowledge as much. *See* Resp. Br. 37 (tax in *Kurth Ranch* "was penal due to its *excessive effect and* deterrent goals") (emphasis added).

Application To Behavior That Is Already Criminal. "By itself, the fact that a * * * statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Ursery*, 518 U.S. at 292; *see also 89 Firearms*, 465 U.S. at 365-366 (fact that civil forfeiture sanction was based on same behavior giving

rise to a criminal violation "is not sufficient to persuade us" that forfeiture was punitive). The laws in *Hawker*, *De Veau*, *Hudson*, and *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924)—all found to pass muster under the Ex Post Facto Clause—were triggered by criminal conviction. The ASORA's registration requirements are no different.

Excessiveness. Respondents claim that the ASORA is "excessive" because it applies to "persons convicted of a sex offense who pose no threat whatsoever to the public." Resp. Br. 42. This glibly assumes what studies have shown is exceedingly difficult to determine in advance—that we can confidently discern which offenders pose no future threat. *See* Pet. Br. 47-48 n.29. In any event, the legislature was not required to tailor its regulation that exactingly. *See* Pet. Br. 46-47; *Hawker*, 170 U.S. at 197; *De Veau*, 363 U.S. at 160.

Respondents and their amici relatedly claim that the ASORA is "excessive" because it overestimates the risk of sex offender recidivism. Resp. Br. 42; N.J. Pub. Def. Br. 22-24; Mass. Comm. for Pub. Counsel Servs. Br. 2-24. Their statistical evidence is unconvincing; it also falls far short of showing that the legislature's choice to endorse contrary evidence was so wrongheaded that it renders the ASORA punitive.

Sex offenders pose a "frightening and high risk of recidivism." *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002). The largest recidivism study ever conducted in the United States recently concluded that, within three years of release, 46% of those imprisoned for rape and 41.4% of those imprisoned for other sexual assault were rearrested. U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* 8 (2002). The study recognized that such rearrest statistics *understate* recidivism rates, *id.* at 2—a point particularly relevant with respect to sexual offenses. *See* Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow-up*

Study, Fed. Probation 58, 58 (1985) (recidivism rates based on arrest or conviction data underestimate actual sex offenses); Lita Furby, *et al.*, *Sex Offender Recidivism: A Review*, 105 Psychological Bulletin 3-30 (1989) (finding that fewer than 10% of sexual offenses are reported). What is more, the study confirmed that those imprisoned for rape and other sexual assault were far more likely than other violent offenders to be rearrested for the same offense after release. U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* 10.

The risk of sex offenders reoffending is particularly "frightening," as this Court put it in *McKune*, because of the havoc such offenses can wreak on the community—and too often on its most vulnerable citizens. *See McKune*, 122 S. Ct. at 2024-25 (noting that "the victims of sexual assault are most often juveniles," and that "[n]early 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger") (citations omitted); U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Offense, and Offender Characteristics* 12 (2000) (67% of sexual assault victims are juveniles, and one in seven are under six years of age). Studies also consistently show that children abused by sex offenders are more likely to become offenders themselves. *See* Lawrence A. Greenfeld, Bureau of Justice Statistics, *Sex Offenses And Offenders* 23 (1997) (noting that 35% of sex offenders were themselves abused as children); *Doe* v. *Poritz*, 662 A.2d 367, 375-376 (N.J. 1995).

Respondents and their amici cite somewhat more optimistic numbers. But the study touted by the New Jersey Public Defender Service (at 22-23 & n.6) to support its argument that "relatively few [offenders] commit another sex offense" examines only the re-conviction and re-arrest rate for sex offenders who served their time at a state treatment facility. Studies have indicated " 'a significant difference between treated and untreated individuals,' " as this Court noted in

McKune: " 'the rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%." 122 S. Ct. at 2024 (quoting U.S. Dep't of Justice, Nat. Inst. of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988)). Nor does the study acknowledge the vast gap between offenses for which arrests are made or convictions are obtained, and the number of reported offenses for which *no* arrests are made—not to mention the very high percentage of sex offenses that go unreported. *See* Furby, *supra*, at 3.

Nor is it helpful to compare recidivism rates of sex offenders with those of other felons. *See, e.g.,* Mass. Comm. for Pub. Counsel Servs. Br. 5; N.J. Pub. Def. Br. 23 (contending that "as a group, sex offenders have lower rates of recidivism than other types of offenders"). Most victims of burglaries, for example, are not minors, and most victims of burglaries are not by virtue of that fact more likely to grow up to be burglars themselves. The legislature could rationally conclude that the potential devastating harm inflicted by sex offenders on vulnerable populations justified adopting regulatory requirements for those offenders and not others, to assist the community in protecting those who cannot protect themselves.

In any event, respondents' competing statistics and studies show only that there is conflicting evidence about sex offenders' propensity to reoffend. Respondents and their amici do not provide any guidance on how this Court—as opposed to the state legislature—can determine what level of threat the citizens of Alaska must tolerate before their representatives may take protective action. It is in exactly these circumstances that the legislature should have the most leeway in fashioning remedies for an intractable social problem. *See Hendricks*, 521 U.S. at 360 n.3; *De Veau*, 363 U.S. at 158 ("Duly mindful as we are of the promising record of rehabilitation by ex-felons, * * * it is not for this court to

substitute its judgment" for that of the legislature); *Hawker*, 170 U.S. at 197 ("Doubtless, one who has violated the criminal law may thereafter reform * * *. But the legislature has power in cases of this kind to make a rule of universal application"). Given the grave risks posed to the community by a reoffense, coupled with evidence of a strikingly high recidivism rate for sex offenders, Alaska's legislature was well within bounds to require sex offenders to register and to make registry information available to the public. Indeed, it makes particular sense for the legislature to make truthful information available to members of the public through an electronic registry; that passive method of notification allows each member of the community to decide whether to access registry information in the first instance, and whether to take precautionary measures in light of what they find.[8]

Finally, the debate over which and how many sex offenders are likely to reoffend is, as we observed in our opening brief, of dubious relevance to the Court's Ex Post Facto Clause inquiry. Pet. Br. 48-49. Respondents' arguments on this score apply across the board, regardless of when the underlying offense was committed, and they are more properly addressed in a due process challenge.

* * * *

The *Mendoza-Martinez* "test" was never meant to be the sort of exercise in sums that the Ninth Circuit conducted; no meaningful outcome is produced by simply adding its factors together. The factors each give insight into facets of the issue, but the question in the end is still a unified inquiry: where the legislature has expressed a regulatory intent, is there overwhelming evidence that the expressed intent is simply a charade for truly punitive goals? The answer in this

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[8] *Cf. 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) (noting that state prohibitions on "the dissemination of truthful, nonmisleading commercial messages" are generally subject to "rigorous" First Amendment review).

case is clear: a law that does not restrain offenders' freedom, does not look or operate like historical punishment, that was motivated by a genuine and compelling regulatory purpose, and that was enacted in measured response to a valid and grave threat to community safety, does not violate the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
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v.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Alaska's sex offender registration and community notification law imposes punishment in violation of the Constitution's prohibition on Ex Post Facto legislation.

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In the Supreme Court of the United States

No. 01-729

GLENN G. GODFREY AND BRUCE M. BOTELHO,
PETITIONERS

v.

JOHN DOE I, ET AL.

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the constitutionality, under the Ex Post Facto Clause, U.S. Const. Art. I § 10, of Alaska's sex offender registration and community notification law.[1] Alaska's law comports with the minimum national standards for state sex offender registration and notification laws established by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999). The Wetterling Act conditions certain federal law enforcement funding on the States' adoption of registration systems for sex offenders who have been released into the community. 42 U.S.C. 14071(a)(1) and (b) (1994 & Supp. V 1999). The Wetterling Act further directs States to release from their registration records "relevant information that is necessary to protect the public concerning a specific person required to register under [the Act]." 42 U.S.C. 14071(e)(2) (Supp. V

[1] The Court has granted certiorari in *Connecticut Department of Public Safety* v. *Doe*, No. 01-1231, to address a challenge under the Due Process Clause to Connecticut's sex offender registration and notification law.

1999). A recent amendment to the Wetterling Act requires States to provide community notification of all registered sex offenders enrolled in or employed at an institution of higher education, without regard to individualized risk assessments. See Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538. Because the question presented implicates the constitutionality and effective operation of federal law, the United States has a strong interest in the resolution of this case.

STATEMENT

1. *Legal Framework*

a. Sex offenders exact a uniquely severe and unremitting toll on the Nation and its citizens for three basic reasons: "[t]hey are the least likely to be cured"; "[t]hey are the most likely to reoffend"; and "[t]hey prey on the most innocent members of our society." United States Dep't of Justice, Bureau of Justice Statistics (BJS), *National Conf. on Sex Offender Registries (National Conf.)* 93 (Apr. 1998). In 1995, more than 355,000 attempted or completed rapes and sexual assaults were reported nationwide. BJS, *Sex Offenses and Offenders (Sex Offenses)* v (Feb. 1997). More than two-thirds of the victims of rape and sexual assault are *under* the age of 18. BJS, *Sexual Assault of Young Children as Reported to Law Enforcement (Young Children)* 2 (July 2000); see also *Sex Offenses* 24 (80% of sexual assault perpetrators had victims under 18). And "nearly 4 in 10" victims of imprisoned violent sex offenders are age 12 or younger. *Sex Offenses* iii; see also *Young Children* 2. Children under 18 were the victims of 46% of all forcible rapes; children under 12 represented nearly half of the victims of all other sexual offenses. *Ibid.* One in ten boys and one in four girls will suffer sexual abuse during childhood. D. Pryor, *Unspeakable Acts: Why Men Sexually Abuse Children* 2 (N.Y. Univ. Press 1996). Most disturbing is that 14% of all sexual assault victims are under the age of 6. *Young Children* 2.

Between 1980 and 1994, the average number of individuals imprisoned for sex offenses increased at a faster rate than any other category of violent crime. *Sex Offenses* 18. By 1994, nearly 100,000 inmates were serving time in state prisons for rape or sexual assault. *Id.* at 15. Another 134,000 convicted sex offenders had been released into the community under some form of supervision, such as probation or parole. *Ibid.* When released into the community, convicted sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon. See *id.* at 27; BJS, *Recidivism of Prisoners Released in 1994 (Recidivism)* 10, Table 11 (June 2002).[2]

Those who commit sex offenses against children present an even higher risk of recidivism, see BJS, *Child Victimizers: Violent Offenders and Their Victims (Child Victimizers)* 9-10 (Mar. 1996); 139 Cong. Rec. 31,250-31,251 (1993) (Rep. Sensenbrenner), and are significantly more likely to attack multiple victims before they are caught, *Child Victimizers* 9. Rapists repeat their offenses at rates up to 35%; offenders who molest young girls, at rates up to 29%; offenders who molest young boys, at rates up to 40%; and those rates do not decline appreciably over time.[3]

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[2] See also California Dep't of Justice, *Effectiveness of Statutory Requirements for the Registration of Sex Offenders* 7 (1988) (20% of sex offenders were rearrested for a subsequent sexual offense); Texas Crim. Justice Policy Council, *Convicted Sex Offenders in Texas: An Overview of Sentencing Dynamics and the Impact of Altering Sentencing Policy* 10 (Feb. 1995) (sex offenders were seven to nine times more likely than other convicted felons to have a prior felony sex conviction); D. Schram & C. Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism (Community Notification)* 3 (Oct. 1995) (43% recidivism rate).

[3] L. Song & R. Lieb, *Adult Sex Offender Recidivism: A Review of Studies* 5-7 (Wash. State Inst. for Public Policy, Jan. 1994) (studies show comparable reoffense rates over 5, 10 and 22 year follow-up periods); J.

Because most studies of sex offenses rely on law enforcement reports, they significantly understate the problem—nearly 70% of sex crimes and 90% of child molestation offenses go unreported. BJS, *Criminal Victimization in the U.S., 1999 Statistical Tables*, Table 93 (Jan. 2001); H.R. Rep. No. 392, 103d Cong., 1st Sess. 4 (1993). Offenders themselves report committing twice or more the number of sex offenses listed in their official records.[4] Child molesters who prey on non-family members have an average of as many as 19.8 victims for those molesting a girl and 150 victims for those molesting a boy.[5]

b. In response to that public safety crisis, the Federal Government, all fifty States and the District of Columbia have adopted sex offender registration and notification laws

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Becker, "Offender: Characteristics and Treatment," 4 *The Future of Children* 184 (1994); R. Karl Hanson, et al., *Long-Term Recidivism of Child Molesters*, 61 J. of Consulting and Clinical Psychology 646, 648 (1993) (23% of the recidivists were reconvicted more than 10 years after they were released); *id.* at 650 ("child molesters appear to be at significant risk for reoffending throughout their life"); *Child Victimizers* 6 (state inmates imprisoned for violent crimes against children were an average 5 years older than those with adult victims; 11% of all child victimizers were age 50 or above when arrested); *Sex Offenses* 21 (7% of rapists and 12% of sexual assault perpetrators are 50 or older); R. Prentky, et al., *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 642-643 (1997) (over 25 years, recidivism rate was 52% for child molesters and 39% for rapists); *Rowe* v. *Burton*, 884 F. Supp. 1372, 1375 (D. Alaska 1994).

[4] See T. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am. J. Crim. L. 127, 150-151 (1993); Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. Marshall L. Rev. 883, 908-909 (1995) (showing even higher ratios of actual sex crimes committed to those appearing on the offenders' official records).

[5] M. Chaffin, *Research in Action: Assessment and Treatment of Child Sexual Abusers*, 9 Journal of Interpersonal Violence 224, 225 (June 1994); see also 139 Cong. Rec. 10,998 (1993) (Rep. Ramstad) ("The typical child sex offender molests 117 children.").

to help members of the public protect themselves and their children from falling prey to sex offenders and to facilitate law enforcement investigations. See App. A, *infra*. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), 42 U.S.C. 14071 (1994 & Supp. V 1999). Evidence before Congress showed that "child sex offenders are generally serial offenders," "the[ir] 'behavior is highly repetitive, to the point of compulsion,'" and "74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child." H.R. Rep. No. 392, *supra*, at 4.[6] Congress determined that community notification was essential to allow members of the public to protect themselves from future crimes by convicted sex offenders.[7]

The Wetterling Act, as amended, sets minimum national standards for state sex offender registration and community notification programs.[8] The Act requires States to register

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[6] See also 142 Cong. Rec. 10,312 (1996) (Rep. Schumer) ("[W]hen these folks come out of prison, the odds are extremely high that they will commit the same or a similar crime again."); 139 Cong. Rec. 30,580 (1993) (Sen. Biden) ("these offenders are a group especially prone to recidivism"); 140 Cong. Rec. 22,520 (1994) (Rep. Dunn) ("The rate of recidivism for these crimes is astronomical because these people are compulsive.").

[7] See, *e.g.*, 142 Cong. Rec. 10,311 (1996) (Rep. Zimmer) ("If Megan Kanka's parents had been aware of the history of the man who lived across the street from them, * * * little Megan would be alive today."); *id.* at 10,314 (Rep. Jackson-Lee) ("This requires strong prevention and education which will keep our children from becoming victims of violent crime."); *id.* at 10,315 (Rep. Dunn) ("Empowering families, women, and children with the knowledge that a potential threat is looming in their community enables them to take the necessary precautions to ensure that there are not second, third, or fourth victims.").

[8] The Wetterling Act was amended twice in 1996 by Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345, which added a mandatory community notification provision, and the Pam Lychner Sexual Offender Tracking and Identification Act, Pub. L. No. 104-236, 110 Stat. 3093, which required lifetime registration for certain offenders and directed the FBI to create a

all persons convicted of a criminal sex or (non-parental) kidnapping offense against a minor, and all persons convicted of a sexually violent offense upon their release, parole, or probation into the community. 42 U.S.C. 14071(a)(1) and (3), (b) (1994 & Supp. V 1999). Offenders must be required to provide current addresses, fingerprints, and a photograph. Most offenders must verify their addresses annually; a "sexually violent predator"—a person convicted of a sexually violent offense who suffers from a mental abnormality or disorder that makes the person likely to engage in predatory sexually violent offenses, 42 U.S.C. 14071(a)(3)(C)—must verify his address quarterly. 42 U.S.C. 14071(b)(3) (1994 & Supp. V 1999). Offenders generally must remain registered for a minimum of ten years; any offender who has been convicted of one aggravated sexual offense, more than one covered sexual offense, or is a sexually violent predator must register for life. 42 U.S.C. 14071(b)(6) (1994 & Supp. V 1999). States must include offenders who were convicted in another State but who have relocated to, work, or attend school in the registering State. 42 U.S.C. 14071(b)(7) and (c) (1994 & Supp. V 1999). Finally, States must "release relevant information that is necessary to protect the public concerning a specific person required to register." 42 U.S.C. 14071(e)(2) (Supp. V 1999). Categorical disclosure of all sex offenders enrolled in or employed at institutions of higher education is required. Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538 (to be codified at 20 U.S.C. 1092(f)(1), and 42 U.S.C. 14071(j)).[9]

Pursuant to Congress's direction, 42 U.S.C. 14071(a) (1994 & Supp. V 1999), the Attorney General has issued regulations implementing the Wetterling Act. See 64 Fed. Reg.

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national sex offender database, see generally 42 U.S.C. 14072 (Supp. V 1999).

[9] These provisions will take effect on October 28, 2002. See Pub. L. No. 106-386, § 1601(c)(2), 114 Stat. 1537; 20 U.S.C. 1092 note.

572 (1999). Those guidelines generally leave substantial discretion to the States in formulating and implementing their registration and notification programs. States are free "to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." *Id.* at 582. States may "make information accessible to members of the public on request" and may "make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders." *Ibid.* But "[i]nformation must be released to members of the public as necessary to protect the public from registered offenders." *Id.* at 581. "[T]he Act does not preclude states from applying such standards retroactively to offenders," and, in fact, requires that States register all individuals whose convictions post-date the State's establishment of a conforming registration system, even if they committed the underlying offense prior to that time. *Id.* at 575, 581. A State's failure to comply with the Wetterling Act renders it ineligible to receive certain law enforcement grant funds. 42 U.S.C. 14071(g)(2)(A) (Supp. V 1999).

c. Alaska passed its sex offender registration and notification law when Alaska was "the rape capital of the nation," had the highest rate of child sexual abuse in the nation, at six times the national average, and had the second highest rate of sexual assault in the nation, the latter having nearly doubled in two years. Minutes, *Hearing on HB 69 Before the House Judiciary Comm. (House Jud. Hearing)*, 18th Alaska Legis., 1st Sess. 4 (Feb. 10, 1993); Minutes, *Hearing on HB 69 Before the House State Affairs Standing Comm. (House State Hearing)*, 18th Alaska Legis., 1st Sess. 9 (Feb. 2, 1993); Minutes, *Hearing on HB 69 Before the Senate Judiciary Comm. (Sen. Jud. Hearing)*, 18th Alaska

Legis., 1st Sess. 9 (Apr. 14, 1993). Evidence before the legislature reported a recidivism rate of "twenty to forty percent with treatment." *House State Hearing* 9-10; see also *House Jud. Hearing* 13 ("for every known perpetration, another 150 were not reported"). Strict and comprehensive registration and notification requirements were deemed especially necessary for Alaska because "[m]any people came to Alaska to get away from their pasts." *House Jud. Hearing* 9.

Based on that evidence, Alaska's legislature found that "sex offenders pose a high risk of reoffending after release from custody," and that "protecting the public from sex offenders is a primary governmental interest." 1994 Alaska Sess. Law ch. 41, § 1. The legislature found, in particular, that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Ibid.* To that end, Alaskan law requires any "sex offender or child kidnapper who is physically present in the state" to register. *Alaska Stat.* § 12.63.010(a) (Michie 2000).[10] A covered offender must register his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, motor vehicle information, and post-conviction treatment history, and must provide a photograph and fingerprints. *Id.* §§ 12.63.010(b)(1)(A)-(H) and (b)(2). The offender must register for 15 years if he was convicted of a single, non-aggravated sex offense and must provide "written verification" of the information annually. *Id.* §§ 12.63.010(d)(1), 12.63.020(a)(2). If he was convicted of an

[10] Alaska's kidnapping law has an affirmative defense for relatives who take a child with the intent to obtain custody. Alaska Stat. § 11.41.300 (Michie 2000); see also *id.* §§ 11.41.320, 11.41.340 (parental kidnapping punished as custodial interference). Alaska's registration law thus applies to familial kidnappers only if they intend to inflict physical injury or sexual assault, or to collect ransom.

aggravated sex offense or of two or more sex offenses, the offender must register for life and provide "written verification" quarterly. *Id.* §§ 12.63.010(d)(2), 12.63.020(a)(1).

The registry information is "confidential and not subject to public disclosure," with the exception of

> the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, * * * place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

Alaska Stat. § 18.65.087(b) (Michie 2000). Alaska publishes its registry on the Internet. Pet. App. 7a; see www.dps.state.ak.us/nSorcr/asp. The law applies retroactively to sex offense convictions entered before passage of the law. 1994 Alaska Sess. Laws ch. 41, § 12(a).

2. *Factual and Procedural Background*

a. Respondents are John Doe I and John Doe II, two convicted sex offenders, and the wife of John Doe I. John Doe I and II were each convicted of the aggravated sex offense of first degree sexual abuse of a minor daughter. Pet. App. 69a; Alaska C.A. Br. 4. Although they were convicted before passage of Alaska's registration and notification law, they were required to comply with it. Respondents filed suit challenging the constitutionality of Alaska's law as a violation of, *inter alia*, the Ex Post Facto Clause. The district court granted summary judgment for petitioners (Pet. App. 69a-117a), finding that the law was enacted for a regulatory, rather than punitive, purpose (*id.* at 85a, 94a), and that there was no clear proof that the law, which simply "make[s] more readily available that which is already public information" (*id.* at 97a), is punitive in effect (*id.* at 85a-91a, 94a-99a).

b. The court of appeals reversed. Pet. App. 1a-32a. The court recognized that Alaska's law was passed for the non-punitive, regulatory purpose of "protecting the public through the collection and release of information." *Id.* at 11a. But it nevertheless found the "clearest proof" (*id.* at 13a (quoting *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997)) that the statute had a punitive effect and thus violated the Ex Post Facto Clause, *id.* at 12a-31a. After reviewing a variety of factors, the court found the law to be punitive principally because the registration provisions were found to be "extremely burdensome," and because public notification on the Internet "exposes all registrants to world-wide obloquy and ostracism." *Id.* at 28a-29a. The court further found that Alaska's law was "excessive in relation to its non-punitive [public safety] purpose" because the law does not permit case-by-case exceptions for offenders who are assertedly rehabilitated, and thus the provisions requiring "disclosure of a past offense are not related to the risk posed." *Id.* at 29a. Concluding that "the Act is far more sweeping than necessary to serve the purpose of promoting public safety," *id.* at 30a, the court held that "the Ex Post Facto Clause limits its application to those sex offenders whose crimes were committed after its enactment," *id.* at 30a-31a.

SUMMARY OF ARGUMENT

Sex offenders pose unique threats to public safety and unique challenges to law enforcement because of (i) their high recidivism rates, (ii) the profound and enduring injuries their crimes can inflict, particularly on children, and (iii) the societal fears and stigma that hinder reporting of such crimes, which in turn results in the multiplication of offenses. In the shared judgment of Congress and all 50 States, registration and community notification programs represent one reasonable means of protecting members of the public from falling victim to future sex crimes. Despite that collective legislative judgment, the court of appeals ruled

that Alaska's law amounted to criminal punishment of sex offenders, in violation of the Ex Post Facto Clause. That decision has no grounding in precedent or logic, and should be reversed.

Alaska passed its law for the purpose of promoting public safety. The statutory text says so, and the legislative history confirms it. Protecting the public from future crimes is a legitimate and compelling interest that may support regulatory, non-punitive measures. Because Alaska's law was animated by that valid civil, regulatory purpose, only the clearest proof of an unmistakably punitive effect will render the law a form of punishment, subject to the Ex Post Facto Clause. There is no such proof, because the law's operation accurately reflects its civil regulatory character.

Alaska's registration and notification provisions are a reasonable means of promoting public safety because they reduce the vulnerability of potential victims and deny prospective offenders the anonymity and secrecy on which they so heavily depend. The law provides citizens with information concerning the existence and offense patterns of offenders living, working, or studying near them. With such information in hand, individuals can protect themselves and their children by increasing their alertness and modifying their conduct in a manner that minimizes their risk of falling victim to a crime. The law accomplishes that goal in a manner that is minimally intrusive. Registration requirements are a common mechanism of civil regulation, and bear no resemblance to recognized forms of punishment. Alaska's law simply makes accessible to those citizens who choose to inquire information already in the public domain. Sex offenders have no ex post facto right to keep their criminal backgrounds a secret.

That Alaska made the legislative judgment to make information available about all registered offenders does not change the law's civil character. As an initial matter,

respondents would no doubt argue that, if the government did endeavor to label individual offenders with threat levels, that would also be punitive. In any event, given the recidivist tendencies of sex offenders as a class, singling out those individual offenders who might pose a diminished risk of reoffending is an inordinately difficult and error-prone task, in an area where the costs of a mistaken judgment can be devastating. Alaska thus reasonably chose to allow members of the public to make those risk determinations themselves. Alaska likewise acted reasonably in posting its registry on the Internet, where the information is available to those persons—and only those persons—who actively seek it out. While some States have chosen different forms of registration or different types of notification mechanisms, that simply reflects the fact that difficult problems require varied solutions.

ARGUMENT

ALASKA'S SEX OFFENDER REGISTRATION AND NOTIFICATION LAW REASONABLY ADVANCES ITS INTENDED CIVIL, REGULATORY PURPOSES OF PROTECTING PUBLIC SAFETY AND ASSISTING LAW ENFORCEMENT, CONSISTENT WITH THE EX POST FACTO CLAUSE

The Constitution prohibits both the State and Federal Governments from passing any "ex post facto Law." U.S. Const. Art. I, §§ 9-10. The Ex Post Facto Clause, however, does not forbid the adoption of civil, regulatory measures with retroactive operation; the prohibition applies only to the passage of "certain types of *criminal* laws." *Carmell* v. *Texas*, 529 U.S. 513, 522 (2000) (emphasis added); see also *Collins* v. *Youngblood*, 497 U.S. 37, 51 (1990). As relevant here, the Ex Post Facto Clause proscribes any law that "*changes the punishment* [for a criminal act], and inflicts a *greater punishment*, than the law annexed to the crime,

when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.); see also *Hopt* v. *Utah*, 110 U.S. 574, 589 (1884).

Because there is no dispute that Alaska's law applies to respondents based on criminal offenses that they committed before the enactment of Alaska's law, the central question in this case is whether Alaska's registration and notification program amounts to criminal punishment, rather than a civil, regulatory measure. *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997). If the legislature intended to create a civil, regulatory scheme, the Court will "reject the legislature's manifest intent" only upon "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention'" to establish a non-punitive regulation. *Id.* at 361 (quoting *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). The evidence of punitive purpose or effect must be "unmistakable," *Flemming* v. *Nestor*, 363 U.S. 603, 619 (1960), and "conclusive," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963). Because Alaska intended its registration and notification law to advance the civil, regulatory purpose of promoting public safety, because it reasonably advances that goal, and because no other factors justify characterizing it as a "penal statute," *Hendricks*, 521 U.S. at 370, the Ex Post Facto Clause is not applicable here.

A. Alaska Intended Its Registration And Notification Law To Promote Public Safety

Alaska's registration and notification law collects information available from public records or within the public domain and makes it more readily accessible.[11] The court of

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[11] A person's physical appearance, name, aliases, date of birth, criminal conviction information, and place of employment generally are all matters of public record or otherwise accessible to the public, as the district court found here. Pet. App. 97a; *Rowe* v. *Burton*, 884 F. Supp. 1372, 1384 (D. Alaska 1994). See also *Patterson* v. *State*, 985 P.2d 1007, 1016 (Alaska Ct. App. 1999) (the information released under the Alaska law "is in large part

appeals agreed that, in light of the documented risk of recidivism, the collection and public accessibility of non-private information about sex offenders advances the "non-punitive purpose" of protecting the public from *future* crimes and facilitating law enforcement investigations of *future* crimes. Pet. App. 11a; see also *Patterson* v. *State*, 985 P.2d 1007, 1011-1012 (Alaska Ct. App. 1999). The Alaska legislature expressly identified "protecting the public from sex offenders" as its "primary governmental interest," 1994 Alaska Sess. Law ch. 41, § 1, and separately determined that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety," *ibid.* In a variety of settings—including laws providing for the civil commitment of dangerous sex offenders—the Court has recognized that "[t]he legitimate and compelling state interest in protecting the community from crime," *Schall* v. *Martin*, 467 U.S. 253, 264 (1984), can support regulatory, non-punitive measures.[12]

There is no basis for concluding that the statute has a punitive purpose because the registration provisions are housed in a title of the Alaska Code that pertains to "Criminal Procedure." See Pet. App. 43a. Codes of criminal procedure frequently include civil provisions. See Pet. App. 81a

already in the public domain"); see generally *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 500 (1994) ("[H]ome addresses often are publicly available through sources such as telephone directories and voter registration lists.").

[12] See *Seling* v. *Young*, 531 U.S. 250, 262 (2001) ("[T]he State ha[s] an interest in protecting the public from dangerous [sex offenders]."); *Hendricks*, 521 U.S. at 363 ("The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded."); *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) ("There is no doubt that preventing danger to the community is a legitimate regulatory goal."); *Fleming*, 363 U.S. at 616 ("the State's power to protect the health and safety of its citizens" is a "regulatory power, and not a purpose to add to the punishment of ex-felons").

(laws relating to medical examiners and post-conviction relief appear in the criminal procedure title); 18 U.S.C. 981 (federal "civil forfeiture" law codified in "crimes and criminal procedure" title). In any event, Alaska's notification provisions are codified in the Health, Safety, and Housing Code. Nor does Alaska's requirement that notice of the registration duty be included in a sentencing judgment and plea agreement suggest a punitive intent. See Pet. App. 84a. Alerting offenders to the civil consequences of their criminal conduct—whether those are registration obligations or immigration repercussions—may be "the appropriate and fair thing to do," but it does not demonstrate "that the legislature intended the registration provisions to be punitive." *Ibid.*[13]

Alaska's determination that its registration and notification law will promote public safety accords with Congress's judgment in enacting the Wetterling Act, see pp. 4-5, *supra*, and the judgments underlying analogous laws enacted by every State in the Nation, see App. A, *infra*. That "uniform legislative judgment" strongly confirms that Alaska's law "serves a legitimate regulatory purpose." *Schall*, 467 U.S. at 268.

B. The Effects Of Alaska's Law Evidence Its Regulatory Purpose

This Court has never invalidated a state or federal law under the Ex Post Facto Clause on the ground that, despite its declared regulatory purpose, its actual effects reveal a punitive character—and there is no basis for doing so here. The Court traditionally has considered seven factors to determine whether a governmentally imposed restriction is so punitive in effect "as to transform what was clearly

[13] Cf. *Lambert* v. *California*, 355 U.S. 225, 229 (1957) (due process requires actual notice of felons' duty to register, under city ordinance, within five days of arriving in the city).

intended as a civil remedy into a criminal penalty." *Hudson* v. *United States*, 522 U.S. 93, 99 (1997) (internal quotation marks and brackets omitted). Those factors are:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Kennedy, 372 U.S. at 168-169 (Fifth and Sixth Amendments); see also *Hudson*, 522 U.S. at 99-100 (Double Jeopardy Clause); *Hendricks*, 521 U.S. at 361-369 (Double Jeopardy and Ex Post Facto Clauses); *Ward*, 448 U.S. at 249 (Self-Incrimination Clause). However, the Court has made clear that those factors are "neither exhaustive nor dispositive" of the constitutional inquiry, *Ward*, 448 U.S. at 249, but are "useful guideposts," *Hudson*, 522 U.S. at 99, for the ultimate determination of whether a governmental scheme, viewed as a whole, unmistakably imposes punishment.

In the present context, the sixth and seventh *Kennedy* factors are the most relevant: whether Alaska's law rationally advances a non-punitive purpose, and whether the law's requirements are excessive in pursuit of that goal. That is because the Ex Post Facto Clause is designed to prevent the passage of laws animated by "ambition, or personal resentment, and vindictive malice" that target particular individuals for punishment. *Calder*, 3 U.S. (3 Dall.) at 389; see also *Miller* v. *Florida*, 482 U.S. 423, 429 (1987) (Ex Post Facto Clause is "aimed at preventing legislative abuses" like "arbitrary or vindictive legislation"). Where legislation broadly advances a legitimate, identifiable regulatory purpose and

its terms are reasonably tailored to achieve that purpose, such legislative abuses are exceedingly unlikely.

In several prior cases, this Court has relied heavily on those two factors in rejecting ex post facto challenges to regulatory measures, despite claims that the laws worked hardships on individuals. See, *e.g.*, *Flemming*, 363 U.S. at 621 (termination of social security benefits for deported aliens does not impermissibly impose punishment where there were plausible, alternative non-punitive purposes for the governmental action); *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion) (exclusion of felons from union fund-raising activities does not impose punishment because the "unpleasant consequences * * * come[] about as a relevant incident to a regulation of a present situation"); cf. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 154 (1956) (applying similar test in Double Jeopardy Clause context to uphold liquidated damages remedy for fraud).[14] The Court has used that same test to distinguish punitive and regulatory purposes in the analogous context of pre-trial restrictions on the liberty of individuals deemed to pose a risk to public safety.

> [T]he punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].

United States v. *Salerno*, 481 U.S. 739, 747 (1987) (internal quotation marks omitted). Accord *Schall*, 467 U.S. at 269; *Bell* v. *Wolfish*, 441 U.S. 520, 538 (1979); see *United States* v. *Ursery*, 518 U.S. 267, 290 (1996) (applying *Ward* test to double jeopardy challenge to civil forfeiture law, and finding

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[14] In contrast, the absence of a relation to a regulatory purpose has marked legislation as punitive. See *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 319-320 (1866) (oath law violates the Ex Post Facto Clause because it has "no possible relation" to a valid regulatory goal).

it "[m]ost significant" that civil forfeiture "serve[s] important nonpunitive goals").

As explained below, consideration of the Court's two central criteria demonstrate that Alaska's law does not punish past conduct; it simply provides citizens with the information necessary to engage in self-protection from the future crimes of persons adjudicated to be sex offenders. Consideration of the remaining five *Kennedy* factors underscores the law's non-punitive character.

1. Alaska's Law Reasonably Promotes Public Safety

Alaska's registration and notification law reasonably advances its stated purpose of protecting the public by providing citizens with the information needed to protect themselves against future crimes and by facilitating police investigations of future crimes.

First, sex offenses are crimes of opportunity, and the threat sex offenders pose to exploit those opportunities is high because most are not in prison, they have an abnormally high rate of recidivism, and many are impervious to treatment. See *Hendricks*, 521 U.S. at 365 (noting Kansas's conclusion that "treatment for sexually violent predators is all but nonexistent"); *Sex Offenses* 18 (60% of sex offenders are not incarcerated); *National Conf.* vii, 5-6, 45. Alaska's law directly reduces the opportunities for victimization. The law allows citizens, through the collation and sharing of non-private information contained in public records or in the public domain, to protect themselves and their children from falling prey to future criminal acts, by increasing their alertness and modifying their behavior.[15]

[15] The Florida website, for example, allowed members of the public to identify an offender who was attending Boy Scout meetings and another who lived in a home that provided daycare. *National Conf.* 70. In Illinois, registry information allowed the public to identify as offenders two Boy Scout leaders, four individuals involved in community youth groups, and others who owned youth camps. *Id.* at 76. In California, registry information has allowed members of the public to identify as sex offenders (among others) a high-risk sex offender who was active in Little League; a bus driver who transported children with disabilities (and was subsequently investigated for molesting two of the children); a custodian in an apartment complex who had keys to 250 units; a number of public school and church volunteers; an applicant for a Santa Claus position at a shopping mall; and a child molester loitering at school bus stops. See Report to the Calif. Legis., *California Sex Offender Information: Megan's Law (Calif. Megan's Law)* 20-22 (July 2001); *Calif. Megan's Law* 13-16 (July 2000); *Calif. Megan's Law* 15-19 (May 1998); Report to the Calif. Legis., *California Sex Offender Information* 12-16 (July 2000); Report to the Calif. Legis., *California Sex Offender Identification Line* 10-16 (July 1997); Report to the Calif. Legis., *California Child Molester Identification Line* 10-17 (July 1996).

Second, registration laws "are common and their range is wide," and they have long been understood as non-punitive "law enforcement technique[s]," by which government can maintain information on and monitor individuals whose activities or behavior pose particular challenges to the public's well-being. *Lambert* v. *California*, 355 U.S. 225, 229 (1957).[16] The registration information allows law enforcement agencies to improve their advice to the public about crime prevention and accelerate their investigation of crimes that occur, thereby limiting the toll that recidivists can inflict. Law enforcement's disclosure of names, photographs, charged offenses, and other identifying information pertaining to persons believed to pose a public safety threat is a common and time-tested method of promoting public safety. The FBI's Ten Most Wanted Fugitives, Ten Most Wanted Terrorists, Most Wanted Dead Beat Parents (child-support delinquents), and Missing Children/Child Kidnapping Alerts serve those same ends.[17]

[16] See, *e.g.*, *Gillette* v. *United States*, 401 U.S. 437 (1971) (draft registration); *United States* v. *Harriss*, 347 U.S. 612 (1954) (registration of lobbyists).

[17] Practice shows that sex offender registration and notification laws strengthen law enforcement. See *Community Notification* 18 ("The offenders who were subjects of community notification appear to have been

2. Categorical Disclosure of All Registered Offenders on the Internet Is Reasonable

The court of appeals concluded that Alaska's statute was excessive in relation to its public safety goal because it does not distinguish between types of offenders and because it publishes the registry on the Internet, rather than specifying particular members of the community to whom disclosure should be made. Pet. App. 23a-27a. In so holding, the court of appeals misapprehended the nature of the sex offender problem and misunderstood its role in reviewing a quintessentially legislative judgment.

(a) Categorical treatment: Alaska's determination not to limit public notification to particular categories of offenders is reasonable and in no way indicative of a punitive scheme. First, because 90% to 95% of criminal convictions are the product of plea bargains,[18] a registrant's conviction record frequently understates the severity and number of his offenses. Even if the record accurately reflected past offenses, sex offenders are notorious for escalating their offenses over time. Minor sex offenses are more often harbingers of worse things to come than reliable evidence of a low risk to public safety.[19]

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arrested for new crimes much more quickly than comparable offenders who were released without notification."); *Calif. Megan's Law* 16-17 (May 1998) (community notification caused a 14-year old girl to resist sex offender's efforts to lure her to his car and allowed police to apprehend him quickly after her report); *National Conf.* 102 (offenders are rearrested twice as quickly when there is community notification).

[18] See *Judicial Business of the U.S. Courts, 2001 Annual Report*, Table D-4, available at www.uscourts.gov/judbus2001/contents.html.

[19] In one study, out of 110 offenders reconvicted of a sex offense, 43% were reconvicted of a more serious sex offense. L. Song & R. Lieb, *Washington State Sex Offenders: Overview of Recidivism Studies* 11 (Wash. State Inst. for Public Policy, Feb. 1995); *House Jud. Hearing* 23 (Feb. 26, 1993); see also 4 *The Future of Children* 177; *Unspeakable Acts* 191-197; *Kansas* v. *Crane*, 122 S. Ct. 867, 872 (2002) (Scalia, J., dissenting) (describing the "increasing intensity" of sex offender's crimes).

The Ex Post Facto Clause does not preclude government from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. That regulatory approach is valid, even if the judgment "is not in all cases absolutely certain" and "sometimes it works harshly." *Hawker* v. *New York*, 170 U.S. 189, 197 (1898) (categorical exclusion of felons from the practice of medicine is not an ex post facto law); see also *DeVeau*, 363 U.S. at 160 (plurality opinion) (categorical exclusion of felons from union fund-raising activities does not violate Ex Post Facto Clause); cf. *Hudson*, 522 U.S. at 104 (debarment from participating in banking industry based on violations is not a criminal punishment for purposes of the Double Jeopardy Clause). The "vital matter," for purposes of the Ex Post Facto Clause, is that the government is not punishing for the past crime. *Hawker*, 170 U.S. at 196. The past conduct simply serves as the "prescribed evidence," *ibid.*, and "the foundation for the judgment as to what the future conduct is likely to be," *American Comm. Ass'n* v. *Douds*, 339 U.S. 382, 413-414 (1950).[20] "[T]hat does not alter the conclusion that [the law] is intended to prevent future action rather than to punish past action." *Id.* at 414.

Second, it is true that there is "nothing inherently unattainable about a prediction of future criminal conduct," *Schall*, 467 U.S. at 278, by sex offenders as a class, given

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[20] See also *Hendricks*, 521 U.S. at 358 ("[P]revious instances of violent behavior are an important indicator of future violent tendencies."); U.S. Sentencing Comm'n, *Report to Congress: Sex Offenses Against Children* 34 (June 1996) ("The most consistent finding is that criminal history, especially a history of sexual offenses, is the most important and accurate predictor of the risk of future sexual offending."); A. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 Cal. L. Rev. 885, 897 (1995) (sex offenders "have a greater tendency to 'specialize' in sex offenses," and the "best predictor" of the subset of criminals who will commit rape "is those offenders who have already been convicted of rape").

their persistently high rates of recidivism. But it does not follow—as the Ninth Circuit incorrectly assumed (Pet. App. 27a)—that the government can identify with equal reliability precisely which individual sex offenders will not repeat their crimes. Such predictions are considered by many experts to be "tentative at best," and are considered "unreliable," by others. *State* v. *Putnoki*, 510 A.2d 1329 (Conn. 1986). Given the inherent difficulties and fallibility in such predictions, it is reasonable and well within Alaska's legislative discretion to err on the side of providing the public with the truthful, non-private information necessary for self-protection, rather than risk potentially dangerous exclusions.[21]

Third, Alaska's approach focuses on enabling individuals to protect themselves. As a general matter, Alaska does not directly notify individuals of particular threats, nor does it label particular offenders by risk level. Rather, Alaska allows members of the public to choose for themselves whether to investigate the presence of sex offenders in their community and, if so, to determine what precautions are appropriate. It is both reasonable and non-punitive for Alaska to conclude that the public interest is better served by a scheme that opens up public records and information to the public and allows an informed citizenry to make its own judgments, than by a scheme that has the government apply its own filter to limit what otherwise publicly available information individuals should have. Nearly half of all the States and territories share that judgment. See App. A, *infra*.

[21] Accordingly, the Ninth Circuit's objection (Pet. App. 27a) that John Doe I has been found by one court not to pose a high risk of reoffending misses the mark. The state court, at best, determined that Doe I was at "low risk"—not no risk—of reoffending. Given the ample data documenting the recidivism rates of perpetrators of incest, it is reasonable for Alaska to leave it up to its citizens to assess the risk they are willing to take. See, *e.g.*, 4 *The Future of Children* 180 (for "incestuous molesters," "freedom from recidivism should never be assumed"; "[r]ecidivism may not occur until many years later").

Congress did likewise, in requiring categorical disclosure of sex offenders enrolled in or employed at institutions of higher education. See Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(b) and (c), 114 Stat. 1537, 1538 (to be codified at 20 U.S.C. 1092(f)(1), and 42 U.S.C. 14071(j)).

Fourth, the Ninth Circuit's reasoning traps Alaska in a Catch-22. If Alaska did have elaborate hearings to undertake the very difficult and elusive task of evaluating prospective risk, and then categorized and labeled offenders accordingly, respondents would no doubt argue that those labels are themselves a form of punishment, and that the procedures evidence an intent to impose punishment, just as the sex offenders argued (unsuccessfully) in *Hendricks*, 521 U.S. at 364, and *Allen* v. *Illinois*, 478 U.S. 364, 371 (1986).

(b) Internet disclosure: Alaska's decision to publish its registry on the Internet likewise does not transform the regulatory program into punishment. First, facilitating and simplifying public access to publicly available information does not bear any resemblance to historic forms of punishment—no physical detention or restriction is involved and no property is taken. Given that private individuals and the press can and do publish the registration information, it does not become punitive for the government to do the same.

Second, Internet posting allows citizens to decide for themselves how much, if any, information they want. Only those who choose to avail themselves of the Internet posting will obtain information—the scope of community notification is thus self-regulating. No one is visited with unwanted police encounters or flyers. At the same time, because sex offenders frequently move and travel in search of victims, limiting notification to those in "close proximity" to the offender (Pet. App. 26a) can leave neighboring populations or those relocating to new areas vulnerable.[22] The rea-

[22] See *Community Notification* 16 (38% of re-offenses occurred in other counties or States); *Federal Recordkeeping and Sex Offenders:*

sonableness of Alaska's judgment is underscored by the shared judgment of 39 other States and territories, which also post sex-offender information on government websites. See App. A, *infra*.

Fundamental to the court of appeals' conclusion that Alaska's scheme is excessive was its insistence on a formulaic response by States to a complex and intractable problem, the very nature of which demands legislative discretion and flexibility. That is precisely why the Wetterling Act and the Attorney General's guidelines leave States free "to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories," and allow States "to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes." 64 Fed. Reg. at 582.

3. Other Factors Confirm Alaska's Regulatory Purpose

Each of the remaining *Kennedy* factors underscores the regulatory character of Alaska's scheme. None of them provides any indication, let alone the "clearest proof," of punitive effect. *Hendricks*, 521 U.S. at 361.

(a) Affirmative disability or restraint: Alaska's registration and notification process is not an affirmative disability or restraint in any sense of those words. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'" *Montana Dep't of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994). Here, the character of the Alaska law bears no resemblance to "the 'infamous punishment' of imprisonment," *Hudson*, 522 U.S. at 104 (internal citation omitted), or to any other characteristically criminal sanction.

Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 13 (1996) ("[T]hese offenders tend to be particularly transient individuals.").

The registration process itself is not unduly burdensome. After the initial registration and photographing, offenders need only fill out a brief form—one side of one page—either annually or quarterly. Indeed, the district court found that the registration process was no more onerous than obtaining a driver's license. Pet. App. 87a. By statute, most quarterly or annual verifications can be done in writing. See Alaska Stat. §§ 12.63.010(d)(1) and (2) (Michie 2000) (requiring only "written" verification); Alaska Admin. Code title 13, § 09.025(d). There is no affirmative disability, let alone inherent punishment, in quarterly reporting to the government, which the Wetterling Act itself requires, 42 U.S.C. 14071(b)(3) (1994 & Supp. V 1999). Self-employed taxpayers, treasurers of political committees, futures commission merchants, importers, and securities brokers and dealers must do the same. 2 U.S.C. 434(a)(2)(A)(iii); 7 U.S.C. 6f(a)(2)(C); 15 U.S.C. 78o-5(b)(2)(A), 78q(h)(1); 17 U.S.C. 1003(c); 26 U.S.C. 527, 6654(c).

The court of appeals plainly erred in rejecting (compare Pet. 4-6, with Pet. App. 14a) petitioners' repeated efforts to clarify the statutory permissibility of written verification by mail, and then seizing upon the supposed requirement of in-person registration to support its invalidation of the law. Ex Post Facto challenges are, by their very nature, facial challenges, *Hudson*, 522 U.S. at 100, 104; *Seling*, 531 U.S. at 263, and courts are to construe statutes to avoid, not to create, perceived constitutional difficulties, see, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).[23] Besides, the Act's

[23] Even if Alaska required in-person verification, which approximately fourteen States do, that would not render the scheme punitive. Such in-person registration would be reasonably related to advancing the government's public safety purposes by verifying the continued presence, iden-

registration provisions are not remotely comparable to "probation or supervised release," Pet. App. 13a, as the court of appeals claimed. Probation and supervised release are usually characterized by a series of conditions that the probationer or released individual must meet and by the supervision of a case officer who is empowered to seek the revocation of the defendant's conditional release for an infraction, resulting in re-imprisonment for the original offense. See generally *Johnson* v. *United States*, 529 U.S. 694 (2000); *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987). Nothing of the kind occurs in Alaska's registration program, which leaves sex offenders free to move where and when they wish and to engage in whatever employment, recreation, or other activities they desire, without any individualized supervision or governmental power to revoke their freedom.

Nor do the notification provisions have a disabling effect, as the court of appeals believed (Pet. App. 14a). The fact that "community obloquy and scorn" (*ibid.*) may ensue from the public availability of information on the Internet does not transform governmental action into an affirmative disability or restraint. In the first place, private reactions to public information are not *governmentally imposed* limitations. Beyond that, there is no evidence whatsoever that laws like Alaska's have led to any increase in vigilantism against sex offenders. The court of appeals identified only *one* incident in the seven-year life of Alaska's law. *Ibid.* Most studies have reported very little vigilantism associated with sex offender notification laws.[24]

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tity, and reliability of registration information. 64 Fed. Reg. at 581; H.R. Rep. No. 256, 105th Cong., 1st Sess. 17 (1997).

[24] 64 Fed. Reg. at 582; *National Conf.* 51 ("Illegal acts actually are quite rare."); Center for Sex Offender Mgmt., *Community Notification and Education* 11 (Apr. 2001); L. Berliner, *Sex Offenders: Policy and Practice*, 92 N.W.U. L. Rev. 1203, 1219-1220 (1998).

The court also expressed concern that Alaska's law might "make it impossible for the offender to find housing or employment." Pet. App. 15a. The ability of employers to do background checks on the criminal records of prospective employees, however, exists independently of Alaska's law and the Wetterling Act. See 42 U.S.C. 5119a (1994 & Supp. V 1999). While Alaska's law does permit the public to learn where offenders are employed, that information does not invariably foreclose housing and employment opportunities; it simply allows members of the public to take such precautions as they deem necessary and to make informed judgments with the information in hand. There are costs to striking the secrecy balance either way, and Alaska reasonably struck that balance in favor of enhancing public knowledge.

(b) Historical treatment: The court of appeals agreed (Pet. App. 18a) that Alaska's law bears no similarity to historic forms of punishment, such as public floggings, the pillory, or branding. The registration and notification law neither restricts physical liberty nor inflicts physical punishment.

(c) Scienter: There is no mental state requirement in Alaska's law that would arguably weigh in favor of finding it to be punitive. As the court of appeals noted, Pet. App. 18a-19a, the law applies to strict liability sex offenses as well as crimes with a *mens rea*—but that is not even the correct question. The operative consideration is whether application of the law itself "comes into play only on a finding of *scienter*." *Kennedy*, 372 U.S. at 168; see also *Hendricks*, 521 U.S. at 362 (scienter inquiry focuses on eligibility for commitment, not underlying behavior); *Ursery*, 518 U.S. at 291 (scienter factor is not implicated by civil forfeiture, even though the underlying crimes required a showing of scienter). The offender's duty to register under Alaska's law does not turn upon any finding of scienter; it turns entirely on

whether the offender has the statutorily identified predicate convictions.

(d) Traditional aims of punishment: The court of appeals held (Pet. App. 19a) that Alaska's law appeared punitive because it "may provide a measure of deterrence" and "its onerous registration obligations appear to be inherently retributive." The court's reasoning is plainly incorrect on both counts.

First, even if the statute has some deterrent effect, that additional salutary purpose would not render the law punitive. Deterrence can equally "serve civil as well as criminal goals." *Hudson*, 522 U.S. at 105; see *Ursery*, 518 U.S. at 292.

Second, the duration of the registration requirements is reasonable. Alaska's judgment that lifetime registration is necessary for the more serious offenders and proven recidivists—a judgment that Congress largely shared in the Wetterling Act, 42 U.S.C. 14071(b)(6) (1994 & Supp. V 1999) —is grounded in substantial evidence showing that the recidivism of sex offenders (unlike most other criminals') does not decline appreciably over time. See note 3, *supra*. Indeed, the very first offender listed on Alaska's registry committed attempted sexual abuse of a minor at the age of 76.

Third, the court's concern (Pet. App. 20a) that the length of the reporting requirement "appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed" is both factually and legally ill-conceived. The lifetime registration requirement, in fact, is triggered by proven recidivism. See Alaska Stat. § 12.63.020(a)(1)(B) (Michie 2000) (having "two or more" eligible offenses triggers lifetime registration obligation). While the life-time registration obligation also applies to those who have committed one "aggravated sex offense," that reasonably reflects the heightened danger that those individuals pose.

(e) Applies to criminal behavior: Finally, the court of appeals emphasized (Pet. App. 21a-23a) that the registration

and notification law applies only to individuals who have been convicted of a sex offense or child kidnapping crime. That the civil regulatory obligation "has some connection to a criminal violation," however, "is far from the 'clearest proof' necessary to show" that the registration obligation amounts to criminal punishment. *Ursery*, 518 U.S. at 292. Quite the opposite, it is "well settled that Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *Ibid.* (internal quotation marks omitted). Further, to the extent Alaska uses the fact of a prior crime as a trigger for its registration and notification scheme, the prior crime "is used solely for evidentiary purposes * * * to support a finding of future dangerousness" sufficient to impose the registration and notification obligation. *Hendricks*, 521 U.S. at 362.

The court's concern (Pet. App. 22a) that Alaska's law does not include those found not guilty by reason of insanity or those civilly committed ignores this Court's decision in *Allen* v. *Illinois*, *supra*, where the Court upheld a sex-offender civil commitment law that applied only to persons against whom the State had brought criminal charges. See 478 U.S. at 370. That Alaska, like Illinois in *Allen*, "has chosen not to apply the Act to the larger class of * * * persons who might be found sexually dangerous does not somehow transform a civil proceeding into a criminal one." *Ibid.* Because there is little doubt that the Act "embrace[s] the great majority of those" who pose a prospective danger to the public, "[i]nferences drawn from the omission of those" other groups "cannot establish, to the degree of certainty required, that [the legislative] concern was *wholly* with" punishing past offenses and not with protecting the public against the prospective risk to safety. *Flemming*, 363 U.S. at 620 (emphasis added).

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APPENDIX A

State and Territorial Sex Offender Registries

Jurisdiction	Website with Individual Offender Information	Categorical Disclosure of Offenders	Legislative Purpose
Alabama	www.gsiweb.net/index.html	Yes. See Ala. Code § 15-20-25(a) (2001).	"The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government." Ala. Code § 15-20-20.1 (2001).
Alaska	www.dps.state.ak.us/nSorcr/asp	Yes. See Alaska Admin. Code, title 13, § 09.050(a) (2000).	"[P]rotecting the public from sex offenders is a primary governmental interest." 1994 Alaska Sess. Law ch. 41, § 1.

In sum, Alaska's sex offender registration and notification provisions are a reasonable means of collecting and disseminating to the public information about a particularly dangerous class of convicted criminals in order to help citizens to protect their own safety. The law functions without imposing intrusive or confining measures on the sex offenders, and it reasonably and unobtrusively advances one of the highest purposes of government—protecting citizens from falling victim to crime. States are free to experiment with more selective registration programs or more targeted notifications, but Alaska's decision to place more publicly available information in the hands of those citizens who choose to inquire does not amount to criminal punishment or a penal measure of any kind, and it does not violate the Ex Post Facto Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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California	No. (Public can view registry information at law enforcement offices on CD-ROM or obtain it by telephone.)	Yes. See Cal. Penal Code § 290.4(4)(A) (West 2002).	"This policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive." *Byron M.* v. *City of Whittier*, 46 F. Supp. 2d 1032, 1035 (C.D. Cal. 1998).
Colorado	www.sor.state.co.us	No.	"[T]he General Assembly did not intend the registration requirement to inflict additional punishment on a person convicted of a sexual offense. Rather, such registration is required in order to aid law enforcement officials in investigating future sex crimes and to protect the public safety." *Jamison* v. *People*, 988 P.2d 177, 180 (Ct. App.1999), cert. denied (Colo. Oct. 18, 1999).

American Samoa	No.	No.	"The commissioner of public safety shall be authorized to release offender registry information as necessary to protect the public of American Samoa." American Samoa Code Ann. § 46.2804 (1999).
Arizona	www.azsexoffender.org/	No.	"[T]he legislature * * * intended to protect communities, not punish sex offenders." *Arizona. Dep't of Pub. Safety* v. *Superior Court*, 949 P.2d 983, 988 (Ct. App. 1997), review denied, 964 P.2d 477 (Ariz. 1998).
Arkansas	No.	No.	The "Act has as its announced purpose the preservation of public safety." *Kellar* v. *Fayetteville Police Dep't*, 5 S.W.3d 402, 407 (Ark. 1999).

District of Columbia	http://mpdc.dc.gov/sev/sor/impreminder.shtm	Yes, with respect to all offenses covered by the Wetterling Act. See D.C. Code Ann. § 22-4011(a).	"[T]he purpose of this regime is to promote public safety in at least three ways: by facilitating effective law enforcement; by enabling members of the public to take direct measures of a lawful nature for the protection of themselves and their families; and, by reducing registered offenders' exposure to temptation to commit more offenses." *Cannon* v. *Igborzurkie*, 779 A.2d 887, 890 (D.C. 2001).
Florida	www.fdle.state.fl.us/sexual_predators/search.asp	Yes. See Fla. Stat. Ann. § 943.043(2)-(3) (West 2001).	"[S]exual offenders * * * often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and * * * protection of the public from sexual offenders is a paramount governmental interest." Fla. Stat. Ann. § 944.606(2) (West 2001).

Connecticut	www.state.ct.us/dps/sor.htm (Access temporarily restricted pending litigation.)	Yes. See Conn. Gen. Stat. Ann. § 54-258(a)(1) (West 2001).	"Certainly one of the most important" purposes for Connecticut's law "is public safety. It enables the recipients to have information that helps to protect them from becoming victims of sexual offenses." *Roe* v. *Office of Adult Probation*, 125 F.3d 47, 54 n.14 (2d Cir. 1997).
Delaware	www.state.de.us/dsp/sexoff/index.htm	No.	"The dissemination of the information pursuant to the notification statute * * * protect[s] members of a community from violent and dangerous sex offenders." *Helman* v. *State*, 784 A.2d 1058, 1073 (Del. 2001).

Idaho	www.isp.state.id.us/ identification/sex_ offender/public_access. html (Website access is restricted to specified entities and individuals under Idaho Code § 18-8283 (2000). Individuals have unrestricted access to registry information at law enforcement offices.)	Yes. See Idaho Code § 18-8323(1) (2000).	"[S]exual offenders present a significant risk of reoffense and th[e] efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction." Idaho Code § 18-8302 (2000).
Illinois	http://samnet.isp.state. il.us/	No.	"The purpose of the Registration Act is to protect the public from sex offenders." *People* v. *Malchow*, 714 N.E.2d 583, 589 (App. Ct. 1999), aff'd, 739 N.E.2d 433 (Ill. 2000).

Georgia	www.state.ga.us/gbi/ sorsch.cgi	Yes. See Ga. Code Ann. § 42-9-44.1(a) and (e) (1997).	Information will be released "that is necessary to protect the public." Ga. Code. Ann. § 42-1-12 (i)(3) (2001).
Guam	http://jisweb.justice. gov.gu/sor/index.html	Yes, with the exception of misdemeanants. See Guam Code Ann. § 89.10 (2002).	No legislative purpose expressly identified in statute or case law.
Hawaii	No.	Yes, see Haw. Rev. Stat. Ann. § 846E-3 (Michie 1999), but the notification provision was held to violate the Hawaii Constitution in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001).	"The Hawai'i legislature enacted HRS chapter 846E in 1997 to ensure the release of relevant information concerning the presence of sex offenders necessary to protect the public. 1997 Haw. Sess. L. Act 316, § 1 at 749-5." *State* v. *Bani*, 36 P.3d 1255, 1262 (Haw. 2001).

Kentucky	http://kspsor.state.ky.us/	Yes. See Ky. Rev. Stat. Ann. § 17.580(1)-(2) (Michie 2001).	"The statutory system is a remedial measure designed to protect and inform the public and not to punish the offender." *Martinez* v. *Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002).
Louisiana	www.lasocpr.lsp.org/Static/Search.htm	Yes. See La. Rev. Stat. Ann. § 15.546(A) (West 2002).	"The legislature finds * * * that protection of the public from sex offenders * * * is of paramount governmental interest." La. Rev. Stat. Ann. § 15.540(A) (West 2002).

Indiana	www.ai.org/serv/cji_sor	Yes. See Ind. Pub. L. No. 116-2002 (amending Ind. Code § 5-2-5-5 (West 2002)).	*Spencer* v. *O'Connor*, 707 N.E.2d 1039, 1043-1045 (Ind. Ct. App. 1999) (holding that notification provisions of the sex offender registration statute were not punitive, but promoted public safety).
Iowa	No.	No.	"[T]he primary purpose of a sex offender registry is not to punish but to aid the efforts of law enforcement officers in protecting society. * * * [W]e believe that the statute was motivated by concern for public safety, not to increase the punishment." *State* v. *Pickens*, 558 N.W.2d 396, 400 (Iowa 1997).
Kansas	www.accesskansas.org/kbi/ro.htm	Yes. See Kan. Stat. Ann. § 22-4909 (2001).	"[The] legislative purpose is to protect public safety and, more specifically, to protect the public from sex offenders as a class of criminals who are likely to reoffend." *State* v. *Wilkinson*, 9 P.3d 1, 5-6 (Kan. 2000).

Maryland	www.dpscs.state.md.us/sor/	Yes. See Md. Code Ann., Crim. Proc. § 11-717(a) (2001).	Maryland's statute authorizes disclosure of any information necessary "to protect the public from a specific registrant." Md. Code Ann., Crim. Proc. § 11-718(a) (2001).
Massachsetts	No.	No.	"The general court hereby finds that * * * that the protection of the public from these sex offenders is of paramount interest to the government." Mass. Gen. Laws Ann. ch. 6, § 178C (West 2002).
Michigan	www.mipsor.state.mi.us/	Yes. See Mich Comp. Laws Ann. § 28.728(2) (West 2002).	"[T]he Michigan Act also seeks to provide the local citizenry with information concerning persons residing near them who have been convicted of sexually predatory conduct and who, by virtue of relatively high recidivism rates among such offenders and the devastating impact that sex crimes have on society, pose a serious threat to society." *Lanni* v. *Engler*, 994 F. Supp. 849, 853 (E.D. Mich. 1998).

Maine	None at present. (There is anticipated "web enabled" direct access to sex offender registration information for law enforcement and, separately, public access to information on predator or high risk offenders. See United States Dep't of Justice, Bureau of Justice Statistics, *Summary of State Sex Offender Registries* 9, App. Table 4 (Mar. 2002)).	No.	"[T]he department shall give notice * * * to members of the public the department determines appropriate to ensure public safety." Me. Rev. Stat. Ann. title 34-A, § 11255(1) (West 2002).

Minnesota	www.doc.state.mn.us/level3/Search.asp	No.	Disclosures are made as "necessary to protect the public and to counteract the offender's dangerousness." Minn. Stat. Ann. § 244.052(4) (West 2002).
Mississippi	www.sor.mdps.state.ms.us	Yes. See Miss. Code Ann. § 45-33-49 (2001).	"The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government." Miss. Code Ann. § 45-33-21 (2001).
Missouri	No statewide registry, but counties may maintain their own websites. See, *e.g.*, www.jcsd.org/sex.htm	Yes. See Mo. Ann. Stat. § 589.417 (2000).	"The obvious legislative intent for enacting sec. 589.400 was to protect children from violence at the hands of sex offenders." *J.S.* v. *Beaird*, 28 S.W.3d 875, 876 (Mo. 2000).

Montana	http://svor2.doj.state.mt.us:8010/index.htm	No.	A "law enforcement agency shall release any offender registration information relevant to the public if the agency determines that a registered offender is a risk to the safety of the community and that disclosure of the registration information may protect the public." Mont. Code Ann. § 46-23-508(1)(b) (1999).
Nebraska	www.nsp.state.ne.us/sor/find.cfm	No.	"The Nebraska State Patrol and any law enforcement agency authorized by the patrol shall release relevant information that is necessary to protect the public." Neb. Rev. Stat. Ann. § 29-4009(3) (2000).

New Jersey	www.njsp.org/info/reg_sexoffend.html	No.	"[P]ublic safety will be enhanced by making information about certain sex offenders * * * available to the public through the Internet." N.J. Stat. Ann. § 2C:7-12 (West 2002).
New Mexico	www.nmsexoffender.dps.state.nm.us/	Yes. See N.M. Stat. Ann. § 29-11A-5.1 (Michie 2001).	"The legislature finds that: * * * the efforts of law enforcement agencies to protect their communities from sex offenders are impaired by the lack of information available concerning convicted sex offenders who live within the agencies' jurisdictions." N.M. Stat. Ann. § 29.11A-2 (Michie 2001).
New York	http://criminaljustice.state.ny.us/nsor/index.htm	No.	"The legislative history of the Act supports * * * the twin purposes served by the [Act]—protecting communities by notifying them of the presence of individuals who may present a danger and enhancing law enforcement authorities' ability to fight sex crimes." *Doe* v. *Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997), cert. denied, 522 U.S. 1122 (1998).

Nevada	No.	No.	Nevada's registration law was "not intended to impose a penal consequence but w[as] instead implemented to protect the community and assist law enforcement in solving crimes. * * * As the record of the legislative hearings reflects, the registration and notification requirements were 'designed to be civil in nature and not punitive.'" *Nollette* v. *State*, No. 35926, 2002 WL 1008895, at * 2 (Nev. May 17, 2002).
New Hampshire	No official government website, but the *Union Leader & New Hampshire Sunday News* publishes the list online. See www.theunionleader.com/pages/sexoffenders1.html	Yes. See N.H. Legis. 241 (2002) (amending N.H. Rev. Stat. Ann. § 651B:7(IV) (2000)).	"[The bill] is designed to assist police." *State* v. *Costello*, 643 A.2d 531, 533 (N.H. 1994) (holding that legislative intent was regulatory, not punitive).

Ohio	No statewide registry, but counties may maintain their own websites. See, *e.g.*, www.hcso.org/	No.	"The release of information about sexual predators and habitual sex offenders to public agencies and the general public will further the governmental interests of public safety." Ohio Rev. Code Ann. § 2950.02(A)(6) (Anderson 2001).
Oklahoma	No statewide registry, but counties may maintain their own websites. See, *e.g.*, www.tulsapolice.org/sexreg/ A private company maintains a statewide registry, at www.vallely.com/registry.html	Yes. See 2002 Okla. Sess. Law Serv. ch. 20 (H.B. 2300) (amending Okla. Stat. title 47, § 584(F) (2001)).	"The Legislature additionally finds that a system of registration will permit law enforcement officials to identify and alert the public when necessary for protecting the public safety." Okla. Stat. Ann., title 57, § 581(B) (2001).

North Carolina	http://sbi.jus.state.nc.us/DOJHAHT/SOR/Default.htm	Yes. See N.C. Gen. Stat. Ann. § 14-208-15(b) (1999).	Sheriffs are required to release relevant information about sex offenders "necessary to protect the public." N.C. Gen. Stat. Ann. § 14-208.10 (1999).
North Dakota	www.ndsexoffender.com/	No.	"The registration information provided by the listed offenders is necessary to aid in the investigation and apprehension of offenders and to protect the health, safety, and welfare of the members of the local community." *State* v. *Burr*, 598 N.W.2d 147, 153 (N.D. 1999).
Northern Mariana Islands	None at present. (Law authorizes the use of any media to distribute information on sex offenders. Pub. L. No. 11-35, § 5).	No.	"To require that all persons convicted of a criminal offense of a sexual nature and other sexually violent crimes register with [the] Department Public Safety and that the community be notified concerning the location of registered offenders when necessary to ensure public safety." Preamble to Pub. L. No. 11-35, H.B. 11-8, 11th N. Marianas Commonwealth Legis.

Oregon	No statewide registry, but counties may maintain their own websites. See, *e.g.*, www.co.bentonor.us/sheriff/corrections/bccc/sonote/	Yes, with respect to all offenses covered by the Wetterling Act. See Or. Rev. Stat. § 181.589 (1999).	"[T]he intended purpose of the sex offender registration requirement was to assist law enforcement in protecting the community from future sex crimes." *State* v. *Matthews*, 978 P.2d 423, 426 (Or. Ct. App. 1999).
Pennsylvania	No.	No.	"These sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitment and th[e] protection of the public from this type of offender is a paramount governmental interest." 42 Pa. Cons. Stat. Ann. § 9791(a)(2) (West 2000).
Puerto Rico	No.	Yes. See P.R. Laws Ann. title 4, § 535e (1998).	Information shall be made available "in view of the threat and danger the persons that commit any of the crimes listed in this chapter, could represent to the [public]." P.R. Laws Ann. title 4, § 535e (1998).

Rhode Island	No.	No.	"Clearly, the Legislature's intent in enacting stricter provisions is to maintain accurate and updated records of persons who pose a potential threat to the safety and health of other persons due to convictions for sexually predatory conduct, sexually aggravated offenses, and a likelihood of committing additional offenses because of demonstrated recidivism." *State* v. *Williams*, No. P197-4106A, 2000 WL 977297, *3 (R.I. Super. Ct. App. 2000).
South Carolina	www.sled.state.sc.us/SLED/default.asp?Category=SCSO&Service=SCSO_01	No.	Information may be disseminated if a "law enforcement officer has reason to believe the release of this information will deter criminal activity or enhance public safety." S.C. Code Ann. § 23-3-490(c) (Law Co-op 2001).

Texas	http://records.txdps.state.tx.us/soSearch/soSearch.cfm	Yes. See Tex. Code Crim. P. Ann., § 62.08 (West 2002).	"The legislature's goal in passing the registration and notification provisions was to advance public safety objectives by facilitating law enforcement's monitoring of sex offenders and by alerting members of the public who may be in an especially vulnerable situation to take appropriate precautions which could deter or prevent further crimes." *Dean* v. *State*, 60 S.W.3d 217, 222 (Tex. App. 2001).
Utah	http://corrections.utah.gov/asp-bin/sexoffendersearchform.asp	Yes. See 2002 Utah Laws ch. 48 (H.B. 245) (amending Utah Code Ann. § 77-27-21.5 (2001)).	"Utah has sought to use the sex offender registry to aid in the civil purpose of prevention and investigation of future sex crimes." *Femedeer* v. *Haun*, 227 F.3d 1244, 1252 (10th Cir. 2000).

South Dakota	No.	Yes. See S.D. Codified Laws § 22-22-40 (Michie 1998).	"[T]he purpose of the public access to registrant information as provided in SDCL 22-22-40 was to alert the public in the interest of community safety." *Meinders* v. *Weber*, 604 N.W.2d 248, 255 (S.D. 2000).
Tennessee	www.ticic.state.tn.us/SEX_ofndr/search_short.asp	Yes. See 2002 Tenn. Laws Pub. Ch. 469 (H.B. 561) (amending Tenn. Code Ann., title 40, ch. 39, Pt. 1).	*Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (finding legislative intent of sex offender registration was not punitive, but to monitor the whereabouts of convicted sex offenders and to disclose that information when necessary to protect the public), cert. denied, 529 U.S. 1053 (2000).

Washington	No statewide registry, but counties may maintain their own websites. See, *e.g.*, www.co.cowlitz.wa.us/sheriff/rso/	No.	"Public agencies are authorized to release information to the public regarding sex offenders and kidnapping offenders when the agency determines that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender." Wash. Rev. Code Ann. § 4.24.550 (West 2002).
West Virginia	www.wvstatepolice.com/sexoff/websearchform.cfm	No.	"The Legislature clearly set forth the purpose of the statute as being regulatory by assisting law enforcement officials' efforts to protect the innocent public from sex offenders." *Hensler* v. *Cross*, 558 S.E.2d 330, 335 (W. Va. 2001).
Wisconsin	http://offender.doc.state.wi.us/public/	No.	"We view this sex offender registration requirement as a safeguard to protect past victims and the public in general, and not a direct punishment." *State* v. *Bollig*, 593 N.W.2d 67, 75 (Ct. App. 1999), aff'd, 605 N.W.2d 199 (Wisc. 2000).

Vermont	No.	No.	Disclosure authorized when "necessary to protect the public concerning persons required to register under this subchapter." Vt. Stat. Ann., title 13, § 5402(b)(3) (2001).
Virginia	http://sex-offender.vsp.state.va.us	No.	"The purpose of the Registry shall be to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming victims of criminal offenders." Va. Code Ann. § 19.2-390.1 (Michie 2000).
Virgin Islands	No.	No.	Offenders required to register under this act are those "predispose[d] to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." V.I. Code Ann. title 14, § 1723 (2001).

Wyoming	http://attorneygeneral.state.wy.us/dci/so/so_registration.html	No.

"[T]he legislature intended to facilitate law enforcement and protection of children." *Snyder* v. *State*, 912 P.2d 1127 1131 (Wyo. 1996).

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Section 14071 of Title 42 (1994 & Supp. V 1999) of the United States Code provides:

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require–

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and

(B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6) of this section.

(2) Determination of sexually violent predator status; waiver; alternative measures

(A) In general

A determination of whether a person is a sexually violent predator for purposes of this section shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

(B) Waiver

The Attorney General may waive the requirements of subparagraph (A) if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator.

(C) Alternative measures

The Attorney General may also approve alternative measures of comparable or greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders in lieu of the specific measures set forth in this section regarding sexually violent predators.

(3) Definitions

For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;

(ii) false imprisonment of a minor, except by a parent;

(iii) criminal sexual conduct toward a minor;

(iv) solicitation of a minor to engage in sexual conduct;

(v) use of a minor in a sexual performance;

(vi) solicitation of a minor to practice prostitution;

(vii) any conduct that by its nature is a sexual offense against a minor; or

(viii) an attempt to commit an offense described in any of clauses (i) through (vii), if the State—

(I) makes such an attempt a criminal offense; and

(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term "sexually violent offense" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18 or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18 or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or

personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(F) The term "employed, carries on a vocation" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(G) The term "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade, or professional institution, or institution of higher education.

(b) Registration requirement upon release, parole, supervised release, or probation

An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State

prison officer, the court, or another responsible officer or official, shall—

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1) of this section, the State prison officer, the court, or another responsible officer or official, as the case may be, shall obtain the name of the person, identi-

fying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry

(A) State reporting

State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting

A State shall participate in the national database established under section 14072(b) of this title in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification

(A) For a person required to register under subparagraph (A) of subsection (a)(1) of this section, State procedures shall provide for verification of address at least annually.

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1) of this section,

except that such person must verify the registration every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address

A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another State

A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

(6) Length of registration

A person required to register under subsection (a)(1) of this section shall continue to comply with this section, except during ensuing periods of incarceration, until—

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or

(B) for the life of that person if that person—

(i) has 1 or more prior convictions for an offense described in subsection (a)(1)(A) of this section; or

(ii) has been convicted of an aggravated offense described in subsection (a)(1)(A) of this section; or

(iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2) of this section.

(7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders

As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from—

(A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial; and

(B) nonresident offenders who have crossed into another State in order to work or attend school.

(c) Registration of offender crossing State border

Any person who is required under this section to register in the State in which such person resides shall also register in any State in which the person is employed, carries on a vocation, or is a student.

(d) Penalty

A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(e) Release of information

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.

(f) Immunity for good faith conduct

Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall be immune from liability for good faith conduct under this section.

(g) Compliance

(1) Compliance date

Each State shall have not more than 3 years from September 13, 1994, in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756 of this title.

(B) Reallocation of funds.—Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(h) Fingerprints

Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 14072(h) of this title.

(i) Grants to States for costs of compliance

(1) Program authorized

(A) In general

The Director of the Bureau of Justice Assistance (in this subsection referred to as the "Director") shall carry out a program, which shall be known as the "Sex Offender Management Assistance Program" (in this subsection referred to as the "SOMA program"), under which the Director shall award a grant to each eligible State to offset costs directly associated with complying with this section.

(B) Uses of funds

Each grant awarded under this subsection shall be—

(i) distributed directly to the State for distribution to State and local entities; and

(ii) used for training, salaries, equipment, materials, and other costs directly associated with complying with this section.

(2) Eligibility

(A) Application

To be eligible to receive a grant under this subsection, the chief executive of a State shall, on an annual basis, submit to the Director an application (in such form and containing such information as the Director may reasonably require) assuring that—

(i) the State complies with (or made a good faith effort to comply with) this section; and

(ii) where applicable, the State has penalties comparable to or greater than Federal penalties for crimes listed in this section, except that the Director may waive the requirement of this clause if a State demonstrates an overriding need for assistance under this subsection.

(B) Regulations

(i) In general

Not later than 90 days after October 30, 1998, the Director shall promulgate regulations to implement this subsection (including the information that must be included and the requirements that the States must meet) in submitting the applications required under this subsection. In allocating funds under this subsection, the Director may consider the annual number of sex offenders registered in each eligible State's monitoring and notification programs.

(ii) Certain training programs

Prior to implementing this subsection, the Director shall study the feasibility of incorporating into the SOMA program the activities of any technical assistance or training program established as a result of section 13941 of this title. In a case in which incorporating such activities into the SOMA program will eliminate duplication of efforts or administrative costs, the Director shall take administrative actions, as allowable, and make recommendations to Congress to incorporate such activities into the SOMA program prior to implementing the SOMA program.

(3) Authorization of appropriations

There is authorized to be appropriated to carry out this subsection, $25,000,000 for each of fiscal years 1999 and 2000.

(j) Notice of enrollment at or employment by institutions of higher education[*]

(1) Notice by offenders

(A) In general

In addition to any other requirements of this section, any person who is required to register in a State shall provide notice as required under State law—

[*] This subsection will take effect on October 28, 2002. See Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601(c)(2), 114 Stat. 1538.

(i) of each institution of higher education in that State at which the person is employed, carries on a vocation, or is a student; and

(ii) of each change in enrollment or employment status of such person at an institution of higher education in that State.

(B) Change in status

A change in status under subparagraph (A)(ii) shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated information is promptly made available to a law enforcement agency having jurisdiction where such institution is located and entered into the appropriate State records or data system.

(2) State reporting

State procedures shall ensure that the registration information collected under paragraph (1)—

(A) is promptly made available to a law enforcement agency having jurisdiction where such institution is located; and

(B) entered into the appropriate State records or data system.

(3) Request

Nothing in this subsection shall require an educational institution to request such information from any State.

Section 14072 of Title 42 (Supp. V 1999) of the United States Code provides:

FBI Database

(a) Definitions

For purposes of this section—

(1) the term "FBI" means the Federal Bureau of Investigation;

(2) the terms "criminal offense against a victim who is a minor", "sexually violent offense", "sexually violent predator", "mental abnormality", "predatory", "employed, carries on a vocation", and "student" have the same meanings as in section 14071(a)(3) of this title; and

(3) the term "minimally sufficient sexual offender registration program" means any State sexual offender registration program that—

(A) requires the registration of each offender who is convicted of an offense in a range of offenses specified by State law which is comparable to or exceeds that described in subparagraph (A) or (B) of section 14071(a)(1) of this title;

(B) participates in the national database established under subsection (b) of this section in conformity with guidelines issued by the Attorney General;

(C) provides for verification of address at least annually;[1]

(D) requires that each person who is required to register under subparagraph (A) shall do

[1] So in original. Probably should be followed by "and".

so for a period of not less than 10 years beginning on the date that such person was released from prison or placed on parole, supervised release, or probation.

(b) Establishment

The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—

(1) each person who has been convicted of a criminal offense against a victim who is a minor;

(2) each person who has been convicted of a sexually violent offense; and

(3) each person who is a sexually violent predator.

(c) Registration requirement

Each person described in subsection (b) of this section who resides in a State that has not established a minimally sufficient sexual offender registration program shall register a current address, fingerprints of that person, and a current photograph of that person with the FBI for inclusion in the database established under subsection (b) of this section for the time period specified under subsection (d) of this section.

(d) Length of registration

A person described in subsection (b) of this section who is required to register under subsection (c) of this section shall, except during ensuing periods of incarceration, continue to comply with this section—

(1) until 10 years after the date on which the person was released from prison or placed on parole, supervised release, or probation; or

(2) for the life of the person, if that person—

(A) has 2 or more convictions for an offense described in subsection (b) of this section;

(B) has been convicted of aggravated sexual abuse, as defined in section 2241 of Title 18 or in a comparable provision of State law; or

(C) has been determined to be a sexually violent predator.

(e) Verification

(1) Persons convicted of an offense against a minor or a sexually violent offense

In the case of a person required to register under subsection (c) of this section, the FBI shall, during the period in which the person is required to register under subsection (d) of this section, verify the person's address in accordance with guidelines that shall be promulgated by the Attorney General. Such guidelines shall ensure that address verification is accomplished with respect to these individuals and shall require the submission of fingerprints and photographs of the individual.

(2) Sexually violent predators

Paragraph (1) shall apply to a person described in subsection (b)(3) of this section, except that such person must verify the registration once every 90 days after the date of the initial release or commencement of parole of that person.

(f) Community notification

(1) In general

Subject to paragraph (2), the FBI may release relevant information concerning a person required to register under subsection (c) of this section that is necessary to protect the public.

(2) Identity of victim

In no case shall the FBI release the identity of any victim of an offense that requires registration by the offender with the FBI.

(g) Notification of FBI of changes in residence

(1) Establishment of new residence

For purposes of this section, a person shall be deemed to have established a new residence during any period in which that person resides for not less than 10 days.

(2) Persons required to register with the FBI

Each establishment of a new residence, including the initial establishment of a residence immediately following release from prison, or placement on parole, supervised release, or probation, by a person required to register under subsection (c) of this section shall be reported to the FBI not later than 10 days after that person establishes a new residence.

(3) Individual registration requirement

A person required to register under subsection (c) of this section or under a State sexual offender offender[2] registration program, including a program established under section 14071 of this title, who changes address to a State other than

---

[2] So in original.

the State in which the person resided at the time of the immediately preceding registration shall, not later than 10 days after that person establishes a new residence, register a current address, fingerprints, and photograph of that person, for inclusion in the appropriate database, with—

(A) the FBI; and

(B) the State in which the new residence is established.

(4) State registration requirement

Any time any State agency in a State with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, is notified of a change of address by a person required to register under such program within or outside of such State, the State shall notify—

(A) the law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated; and

(B) the FBI.

(5) Verification

(A) Notification of local law enforcement officials

The FBI shall ensure that State and local law enforcement officials of the jurisdiction from which, and the State and local law enforcement officials of the jurisdiction to which, a person required to register under subsection (c) of this section relocates are notified of the new residence of such person.

(B) Notification of FBI

A State agency receiving notification under this subsection shall notify the FBI of the new residence of the offender.

(C) Verification

(i) State agencies

If a State agency cannot verify the address of or locate a person required to register with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, the State shall immediately notify the FBI.

(ii) FBI

If the FBI cannot verify the address of or locate a person required to register under subsection (c) of this section or if the FBI receives notification from a State under clause (i), the FBI shall—

(I) classify the person as being in violation of the registration requirements of the national database; and

(II) add the name of the person to the National Crime Information Center Wanted person file and create a wanted persons record: *Provided*, That an arrest warrant which meets the requirements for entry into the file is issued in connection with the violation.

(h) Fingerprints

(1) FBI registration

For each person required to register under subsection (c) of this section, fingerprints shall be obtained and

verified by the FBI or a local law enforcement official pursuant to regulations issued by the Attorney General.

(2) State registration systems

In a State that has a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, fingerprints required to be registered with the FBI under this section shall be obtained and verified in accordance with State requirements. The State agency responsible for registration shall ensure that the fingerprints and all other information required to be registered is registered with the FBI.

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned

for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

(j) Release of information

The information collected by the FBI under this section shall be disclosed by the FBI—

(1) to Federal, State, and local criminal justice agencies for—

(A) law enforcement purposes; and

(B) community notification in accordance with section 14071(d)(3) of this title; and

(2) to Federal, State, and local governmental agencies responsible for conducting employment-related background checks under section 5119a of this title.

(k) Notification upon release

Any State not having established a program described in subsection (a)(3) of this section must—

(1) upon release from prison, or placement on parole, supervised release, or probation, notify each offender who is convicted of an offense described in subparagraph (A) or (B) of section 14071(a)(1) of this title of their duty to register with the FBI; and

(2) notify the FBI of the release of each offender who is convicted of an offense described in subparagraph (A) or (B) of section 14071(a)(1) of this title.

Supreme Court, U.S.
FILED
JUN 3 2002
CLERK

No. 01-729

IN THE
Supreme Court of the United States

GLENN G. GODFREY and BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Alaska's Sex Offender Registration Act violates the *ex post facto* clause of the Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members included state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The incidence of sex crimes is a matter of great public concern. Sex crimes frequently impose both physical injury and emotional trauma on their victims. While the States have greatly increased their prosecution efforts, most sex offenders are eventually released to the community. Studies have found that a substantial number of sex offenders will reoffend following their release and that reoffending can occur as much as twenty years later. One report concludes that "many sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." Kim English *et al.*, U.S. Dep't of Justice, *Managing Adult Sex Offenders in the Community - A Containment Approach* 2 (1997)

"Sex crimes flourish in secrecy." *Id.* Every State has therefore enacted a statute requiring registration and authorizing public disclosure of relevant sex offender information. These statutes support an important national scheme to track the whereabouts of released sex offenders.

The court of appeals held that the application of Alaska's Sex Offender Registration Act to offenders who committed their crimes before this law's enactment imposes additional punishment in violation of the *ex post facto* clause. This

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

holding is manifestly erroneous. If affirmed, it would undermine the ability of the States to protect their citizens from recidivist sex offenders.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Sex offenses impose an extraordinary toll on society. In addition to the costs of medical and mental health care, such crimes impose on their victims both physical injury and great emotional trauma. State and local governments have a compelling interest in reducing the high incidence of sex crimes and in protecting citizens from becoming victims of such crimes.

Numerous studies have found that a substantial portion of convicted sex offenders commit new sex offenses following their release to the community. For example, a study of released child molesters found a 52 percent failure rate for committing a new sex offense over a twenty five-year period. *See* Robert Prentky *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643 (1997). Moreover, in several studies in which sex offenders were interviewed, they admitted to committing vastly more sex offenses than those for which they were arrested. Research has also established that some sex offenders re-offend twenty years following their release.

While some sex offenders do not reoffend, many do. Predicting whether a particular sex offender is likely to re-offend is, however, a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant to the prediction. The difficulty of making such predictions is compounded by the evolving and sometimes inchoate nature of the criminological and scientific research.

State legislatures are not required to wait for the scientific and criminal justice communities to conclusively analyze every category of sex offense and every nuance of the problem of recidivism and to compile more perfect data-sets before acting to protect their citizens. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). In any event, "[t]he prediction of future behavior can never be done with certainty since people and circumstances can and do change." R. Karl Hanson, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 2 (1997).

2. ASORA is a regulatory program which does not impose additional punishment under the *ex post facto* clause. As the court of appeals acknowledged, the Alaska legislature "acted with a non-punitive intent" when it enacted ASORA. Pet. App. 11a. Nor have respondents shown by "the clearest proof" that ASORA is "so punitive . . . in . . . effect as to negate [the State's] intention to deem it civil." *Kansas v. Hendricks*, 521 U.S. at 361 (internal quotations and citation omitted). Indeed, the Court has explained that "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* at 360 n.3 (internal quotation and citation omitted). Because the court of appeals disregarded these principles and improperly substituted its own policy preferences for those of the Alaska legislature, its judgment should be reversed.

The court of appeals discounted the State's remedial interests in protecting its citizens from sex crimes. In its view, ASORA is punitive because it is "so broad and sweeping." Pet. App. 30a. The court particularly noted that ASORA imposes a "substantial disability" on sex offenders and that the statute is excessive because of both the "severity of the disabilities it imposes" and because it subjects all offenders to internet disclosure without providing individualized risk assessments. *Id.* at 28a-30a.

The court of appeals asserted that ASORA imposes a "substantial disability" because it "require[s] in-person registration at a local police station . . . four times each year for life in the case of some defendants." *Id.* at 28a. The court likened this requirement to the conditions typically imposed on offenders placed on probation or granted parole. Both the plain text of ASORA and informational materials published by the State make clear, however, that after the initial registration, quarterly verifications may be done by mail. The court's reasoning is thus based on a patently erroneous reading of the statute. Moreover, ASORA's requirements do not remotely approach the onerous conditions typically imposed on an offender as a condition of probation or parole.

ASORA also does not prohibit an offender from voting, holding public office, or bar an offender from a profession or holding an occupational license. While compliance may in some instances result in the loss of certain employment opportunities, the entries of numerous registered sex offenders indicate that they have obtained employment. And insofar as some sex offenders are denied certain employment opportunities, this condition does not arise from a statutory prohibition on employment but from the decisions of private employers. ASORA is thus "certainly nothing approaching the infamous punishment of imprisonment." *Hudson v. United States*, 522 U.S. 93, 104 (1997) (other citations and internal quotations omitted).

Nor is there any merit to the court of appeals' contention that ASORA imposes a disability because it "exposes all registrants to world-wide obloquy and ostracism." Pet. App. 28a-29a. The court ignored that the information obtainable from Alaska's website relates the historical fact of a conviction obtained through procedures that provide substantial safeguards. Moreover, the court did not explain how those persons who live outside of Alaska and have no contact with an offender can engage in ostracism by viewing the

website or how an offender can feel ostracized by persons thousands of miles away with whom he has never had contact.

3. ASORA is not punitive by virtue of the fact that it does not provide individualized risk assessment. Individualized risk assessment is not constitutionally required in sex offender registration and disclosure schemes. *Cf. Hendricks*, 521 U.S. at 360 n.3.

There is substantial research questioning the accuracy of clinical predictions of sex offenders' risk of reoffending. Moreover, while it has been suggested that actuarial methods of risk assessment are superior to clinical predictions, the subject remains controversial in the scientific community. While substantial advances have been made in actuarial risk assessment with respect to the prediction of general criminal recidivism, "these general measures have not been particularly effective in predicting sexual recidivism." R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y & L. 50, 52 (1998). In part, this is because "[t]here has been relatively little empirical research on how best to combine risk factors for sexual offenders." *Id.* at 62. Given the uncertainty that exists in the area of predicting sex offense recidivism and the evolving nature of the research, a State can elect to make relevant information available to its citizenry without individualized risk assessment. That Alaska does so does not make its scheme punitive.

I. PROTECTING CITIZENS FROM SEX CRIMES IS A COMPELLING CONCERN OF STATE AND LOCAL GOVERNMENTS

A. Sex Crime Is A Social Problem Of Extra-ordinary Magnitude

The incidence of sex crimes is a matter of great public concern. State and local governments have a compelling interest in reducing the high number of these crimes, which impose enormous harm on their victims.

It is widely acknowledged that government statistics underreport the level of sex crimes. *See* Robert A. Prentky *et al.*, U.S. Dep't of Justice, *Child Sexual Molestation: Research Issues* 1 (1997) (noting that "[t]he assumption that sexual crimes against children and teenagers are under-reported is now commonly accepted"). Various studies have concluded that the number of such offenses is enormous. *See, e.g.*, Ted R. Miller *et al.*, U.S. Dep't of Justice, *Victim Costs and Consequences: A New Look* 2-3 (1996). For example, the Miller study (which reviewed other studies) estimated that from 1987 through 1990, children were the victims of an annual average of 71,000 rapes and 114,000 acts of other forms of sexual abuse. *See id.* at 3. Adults were the victims of 1,133,000 rapes and sexual assaults. *See id.*; *see also id.* at 5 (noting study that surveyed adult women finding that in 1990, 683,000 women were raped, but which did not include rapes of persons under the age 18 or of males).

Sex offenses impose on their victims substantial costs of both a tangible and intangible nature. *See id.* at 9, 14-15. Beyond the costs of medical and mental health care, such crimes can cause both physical injury and great emotional trauma. As another report explains, "the trauma associated with sexual assault include shame, self-blame, fear, developmental crises, post-traumatic stress disorder, and the

threat or actuality of physical violence, terror, and injury." Kim English *et al.*, U.S. Dep't of Justice, *Managing Adult Sex Offenders in the Community - A Containment Approach* 1 (1997). Moreover, "what might be regarded by some as a relatively minor type of sexual assault (e.g., 'just fondling') can be extremely traumatic to a victim who trusted the perpetrator." [2] *Id.*

Most troubling, in several studies sex offenders have admitted to "vastly more" criminal paraphilic acts "than those for which they were convicted." Prentky, *Child Sexual Molestation*, at 1. In one study, which conducted confidential interviews with 561 non-incarcerated paraphiliacs, 224 of the subjects reported committing 5,197 acts of non-incestuous child molestation against 4,435 female victims and 153 of the subjects reported committing 43,100 acts against 22,981 male victims. *See* Gene G. Abel *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3, 19 (1987). With respect to incestuous acts, 159 of the study's subjects reported committing 12,927 acts of incest against 286 female victims and 44 subjects reported committing 2,741 acts of incest against 75 male victims. Finally, 126 of the subjects reported committing 907 acts of rape against 882 victims. *See id.*[3]

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[2] According to a recent Justice Department report, 34.2% of child sexual assaults were committed by a family member of the victim; another 58.7% were committed by acquaintances of the victim. *See* U.S. Dep't of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10 (2000) (Table 6). With respect to children under the age of 12, the rate of sexual assault by family members is even more pronounced: 48.6% of sexual assaults on children under age 6 were committed by a family member and 42.4% of sexual assaults on children ages 6 to 11 were committed by a family member. *Id.*

[3] One hundred forty-two of the study's subjects admitted to 71,696 acts of exhibitionism. *See* Abel, *Self-Reported Sex Crimes*, at 19.

Another study of 23 rapists and 30 child molesters participating in a treatment program also indicates that sex-offenders commit far more sex offenses than they are arrested for. While "the rapists had an average of less than two arrests each, they collectively admitted to more than 5,000 offenses including 319 child molestations and 178 rapes." Virginia Criminal Sentencing Commission, *Assessing Risk Among Sex Offenders in Virginia* 43 (2001) (discussing Robert E. Freeman-Longo & Geral T. Blanchard, *Sexual Abuse in America: Epidemic of the 21st Century* (1998)). Moreover, while the 30 child molesters had "an average of only 1.5 arrests each," they "admitted to over 20,000 acts, including nearly 6,000 child molestation offenses and 213 rapes of adult women." *Id.* Finally, using polygraphy as part of its treatment program, the Colorado Dep't of Corrections found that "while official records indicated an average of only two victims per offender," the offenders admitted to an "average 184 victims per inmate." *Id.* As one report concludes, "[m]any sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." English, *Managing Adult Sex Offenders in the Community*, at 2.

In response to the problem of sex crimes, the States have substantially increased their prosecution efforts. Since 1980, the States have "more than doubled" the annual rate of conviction for rape, child molestation, and sexual assault and are now incarcerating more than four times as many sex offenders as they did in 1980.[4] *See Managing Adult Sex Offenders*, at 1; U.S. Dep't of Justice, *Correctional Populations in the United States, 1997* 6 (2000) (table 1.13).

[4] Between 1980 and 1992, "the number of adults convicted annually of rape, child molestation, or other forms of sexual assault more than doubled" from 8,000 to 19,100. *Managing Adult Sex Offenders*, at 1. Between 1980 and 1994, the number of sex offenders in state prisons increased from 20,500 to 88,100. *See id.*

Nonetheless, "[t]he vast majority of sex offenders are released eventually" to the community. Prentky, *Child Sexual Molestation*, at 8.

A large body of research supports the conclusion that a substantial portion of released sex offenders will reoffend. *See Assessing Risk Among Sex Offenders in Virginia* at 17-18 (listing numerous studies). For example, a study, discussed more fully below, found that 115 treated child molesters had a 52 percent failure rate over a 25-year period when measured by a re-arrest for a new sex offense. *See* Robert Prentky *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643-44 (1997).[5] The same study tracked 136 rapists over the same period and found a 39 percent failure rate when measured by a re-arrest for a new sex offense. *Id.* at 635, 642-43. Another study of 191 child molesters (which followed 93% of the molesters for more than 15 years) found a 35% rate of reconviction for a new sex offense. R. Karl Hanson *et al.*, *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. Res. in Crime & Delinq. 325, 332 (1995). As demonstrated by these studies, as well as the studies of self-reported victimizations, *see* discussion *supra* at 7-8, state and local officials have a justifiably compelling concern that released sex-offenders will engage in recidivist acts.

This is not to deny the existence of research suggesting lower recidivism rates than those cited above, *see Assessing Risk Among Sex Offenders in Virginia*, at 17-18 (listing studies), or that the "[t]he literature on sex offenders shows considerable variability in estimates of recidivism rates." Prentky, *Child Sexual Molestation*, at 11. There are,

[5] "Failure rate is an estimate [of recidivism] that takes into account the amount of time each offender has been on the street and thus able to reoffend." Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 641. *See* discussion *infra* at pp. 11-12 n.7.

however, substantial "methodological differences in existing studies." *Id.* at 10. Such factors as "differences in the definition of 'reoffense,' in the type of criminal offense indexed, and in the length of the exposure period being considered" contribute to "this variability." *Id.*

These methodological differences do not, however, support the Does' assertion that "recidivism statistics are far too unreliable" to support ASORA. Reply Br. for Appellants at 4, *Doe v. Otte* (9th Cir.). To the contrary, most of these factors result in the *underestimation* of recidivism rates.

For example, a study which measures recidivism based on convictions for a new sex offense will have lower rates than one which measures recidivism based on arrests. An offender, however, may be acquitted because witnesses "may refuse. . . to testify" or the charge may be "reduced in a plea agreement." *Assessing Risk Among Sex Offenders in Virginia* at 7; *see also* Prentky, *Child Sexual Molestation*, at 11. Moreover, since many sex offenses are never reported to law enforcement authorities (and even if reported, the perpetrator may not be identified or caught), there is an inherent bias towards lower recidivism rates in most studies. *See* Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 641. As the American Psychiatric Association's Task Force explains, "[s]exual offenses are grossly underreported, and for this reason most measures of recidivism or treatment outcome are flawed." American Psychiatric Association, *Dangerous Sex Offenders* 129 (1999); *see also id.* at 132-33 ("official arrest rates do not reflect the actual number of acts committed by any paraphilic individual"). Thus, while "rearrest rates and reconviction rates are frequently used, the most accurate, although potentially still flawed, outcome variable may be a combination of these rates and self-reported sexual behaviors that are present in only a few of the reported studies." *Id.* at 129.

Moreover, most studies use finite periods to calculate recidivism rates and express the rate as a "simple . . . proportion of individuals who have reoffended during the study period;" a shorter period will result in a lower rate as the study excludes those who reoffend after the end of the period. Prentky, *Recidivism Rates*, at 641.[6] Furthermore, because discharged offenders have different release dates and some offenders will commit new crimes and be re-incarcerated, all study subjects are not "on the street and thus able to reoffend" for the full study period. *Id.* Thus, recidivism studies which use "simple percentages" will "*underestimate* the rate of recidivism." *Id.*; *see also* Prentky, *Child Sexual Molestation*, at 11.

To show how many studies underestimate recidivism, one study followed 115 child molesters and 136 rapists who were released over a 25-year period from the Massachusetts Treatment Center for Sexually Dangerous Persons after "being found no longer sexually dangerous." Prentky, *Recidivism Rates*, at 637. In addition to using the traditional method of simple percentages, the study used survival analysis to determine the probability that a released offender would either be charged with, convicted of, or imprisoned for a new sex offense over the study period. *See id.* at 650; *see also* Prentky, *Child Sexual Molestation*, at 11-14. Using the arrest data, the study estimated that at 25 years there was a 52 percent failure rate[7] for committing a new sexual offense,

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[6] Indeed, four-fifths of the studies were based on a one-year period. Prentky, *Recidivism Rates*, at 636.

[7] As the Prentky study explains, "[r]ecidivism may be operationalized in a variety of different ways. . . . [T]he most common method is to report the simple proportion of individuals known to have reoffended during the study period." *Recidivism Rates*, at 641. "This method will *underestimate* the rate of recidivism, because some of those individuals who were in the community for a briefer period of time may still reoffend." *Id.* Another method is to calculate the failure rate, which "is an estimate that takes into account the amount of time each offender has been on the street and thus

with an average of 3.64 years before reoffense; using the conviction data, it estimated a 41 percent failure rate; and using the imprisonment data, it estimated a 37 percent failure rate.[8] *See* Prentky, *Recidivism Rates*, at 643-44; *see also* Prentky, *Child Sexual Molestation*, at 12-13.

Most significantly, the study found that "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release [and that] child molesters in [the] sample reoffended as late as 20 years following release." *Id.* at 14. The study further concluded that if it "had been restricted to the conventional exposure period of 12 to 24 months, approximately 40 to 45 percent of new sexual charges whould have been missed [and even] if followup had been extended to 60 months, 30 percent of new sexual charges would still have been missed." *Id.*[9] While the study advises that the "marked heterogeneity of sexual offenders precludes automatic generalizations of [these] rates . . . to other samples," and that "actual rates may differ considerably depending on the composition of the sample," it nonetheless recognizes "the proclivity of a core subgroup of sexual

able to reoffend. . . . [P]rocedures that take into account time at risk (or exposure time) yield much more accurate estimates of recidivism." *Id.*

[8] These rates compared with a 32% rate of charges for new sex offenses, 25% rate of new convictions for sex offenses, and a 23% rate of imprisonment for new sex offenses. Prentky, *Recidivism Rates*, at 644. The use of a simple percentage thus resulted in underestimation of reoffense rates by 38 to 39%. *Id.*

Twenty-six percent of rapists were charged with a new sexual offense "with an average of 4.55 years . . . before reoffense." *Id.* at 642. The failure rate calculated on this basis was 39%. *Id.*

[9] The study also found with respect to rapists that if it had "restricted our follow-up to the convention[al] . . . period of 12 or 24 months, we would have erred by approximately 30% or 25%, respectively." Prentky, *Recidivism Rates*, at 645. Moreover, use of a five-year period would have resulted in "miss[ing] approximately 20% of the new charges." *Id.*

offenders to reoffend." Prentky, *Recidivism Rates*, at 656. And as explained above, other studies suggest a similarly high rate of recidivism. *See id.* at 653.

Thus, while some sex offenders do not reoffend, many do. Predicting whether a particular sex offender is likely to re-offend is, however, a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant in making this assessment. *See, e.g.*, R. Karl Hanson & Andrew Harris, Department of the Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism* 3 (1998) (available at http://www.sgc.gc.ca/epub/corr/e199801b/e199801b.htm). The difficulty is compounded by the inchoate nature of the criminological and scientific research. *See* R. Karl Hanson, Department of the Solicitor General of Canada, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 3 (1997) (available at http://www.sgc.gc.ca/epub/corr/e199704/e199704.htm) (noting that "[t]here have been few attempts to develop objective risk scales specifically for sexual offense recidivism"). As Prentky concludes, "there is no reliable body of empirically derived data that can inform and guide decisionmaking about reoffense risk." *Child Sexual Molestation*, at 9.

The Constitution does not require state legislatures to wait for scientific experts conclusively to analyze every category of sex offense[10] and every aspect of the problem of

[10] For example, some studies suggest that incest offenders have lower recidivism rates than other categories of offenders. There is, however, substantial research which has found that "victims with close relationships with the perpetrators are least likely to report sexual abuse." Kim English *et al.*, Colorado Dep't of Pub. Safety, *The Value Of Polygraph Testing In Sex Offender Management* 33 (2000) (discussing studies). Given the disruption that intervention of the criminal justice system entails and the power relationships that frequently exist within families, this is not a surprising conclusion. Moreover, despite the "common myth . . . that

recidivism before acting to protect their citizens. Indeed, "[t]he pre-diction of future [sex offender] behaviour can never be done with certainty since people and circumstances can and do change." Prentky, *Child Sexual Molestation*, at 2. *See also* Hanson, *Development of a Brief Actuarial Risk Scale*, at 2.

II. ALASKA'S SEX OFFENDER REGISTRATION ACT IS A REGULATORY PROGRAM AND DOES NOT IMPOSE PUNISHMENT UNDER THE *EX POST FACTO* CLAUSE

The *ex post facto* clause """forbids the application of any new punitive measure to a crime already consummated."""" *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997) (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995)) (other citation omitted). The Court has made clear, however, that the clause "pertain[s] exclusively to penal statutes." *Id.* As relevant here, its protections are triggered only if the Alaska Act "'changes the punishment, and inflicts a greater punishment, than the law annexed to the

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incest offenders perpetrate their crimes only against family members," several studies have found that a substantial portion of incest offenders have committed sex offenses against non-family members. *Id.* at 36.

A recent study of incest offenders who were subjected to polygraph examinations found a high degree of such cross-over offending. Thus, while only 4.8% of the offenders admitted to committing offenses against a non-family member before polygraphy, afterwards 34.6% admitted to committing offenses against non-family members. *Id.* at 38. And while only 9% of these incest offenders admitted to having adult victims before polygraphy, afterwards 35% admitted to having adult victims. *Id.* at 37. *See also* Gene G. Abel *et al.*, *Multiple Paraphilic Diagnoses among Sex Offenders*, 16 Bull. Am. Acad. Psychiatry L. 153, 163 (1988) ("contrary to traditional belief, incestuous child molesters are or have been involved very frequently with children outside the home").

crime, when committed.'" *Lynce v. Mathis*, 519 U.S. 433, 441 & n.13 (1997) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

In making this determination, the Court looks first at a statute's purpose to determine whether it creates a valid civil regulatory regime or retroactively increases punishment. *See Hendricks*, 521 U.S. at 361. The Court has made clear that it "will reject the legislature's manifest [regulatory] intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The Court has further explained that "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Id.* at 360 n.3 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)); *see also id.* at 375 (Breyer, J., dissenting) ("The Constitution permits a State to follow one reasonable professional view, while rejecting another."); *Jones*, 463 U.S. at 364 n.13 ("The lesson we have drawn is not that government may not act in the face of . . . uncertainty [in the field of psychiatry], but rather that courts should pay particular deference to reasonable legislative judgments.").

As explained below, the court of appeals disregarded these principles and improperly substituted its own policy preferences for those of the Alaska legislature. Its judgment should accordingly be reversed.

A. ASORA Is Not A Punitive Statute

The court of appeals correctly concluded that the Alaska legislature "acted with a non-punitive intent" when it enacted ASORA. Pet. App. 11a. Indeed, the Alaska legislature specifically found that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the

public from sex offenders is a primary governmental interest," and that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety." *Id.* at 10a-11a (quoting 1994 Alaska Sess. Laws 41, § 1). As the court below correctly recognized, "these findings demonstrate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information." *Id.* at 11a.

The court of appeals nonetheless rejected the Alaska legislature's "manifest intent" and held that respondents had met their "heavy burden" of providing "'the clearest proof'" that ASORA is punitive in effect. *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248). Applying the seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963),[11] the court acknowledged that "[t]hree factors"—the absence of a scienter requirement, the fact that similar statutes "have not historically been regarded as punishment," and ASORA's non-punitive purpose of protecting public safety—"suggest that the Act is not punitive." Pet. App. 29a. The court then proceeded, however, to discount these factors, largely because of its view that ASORA is "so broad and sweeping." *Id.* at 30a; *see also id.* at 29a.

While the court reasoned that the four remaining factors supported its holding that ASORA is punitive, two factors

[11] The *Mendoza-Martinez* factors are:

> whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purposes assigned . . . .

372 U.S. at 168-69.

were particularly significant. *Id.* at 28a. The first was its conclusion that the statute imposes a "substantial disability" on sex offenders, which "is exacerbated by the public notification provisions that . . . exposes [*sic*] all registrants to world-wide obloquy and ostracism." *Id.* The second was its conclusion that ASORA is "excessive in relation to its non-punitive purpose" because of "the undifferentiated scope of the Act" and the "severity of the disabilities it imposes." *Id.* at 28a-30a.

As explained below, the court's holding is based on its erroneous characterization of the statute's registration and disclosure provisions. Moreover, the court's conclusion that ASORA is excessive in relation to its purpose (which is based on its repeated and exaggerated invocation of the disability factor), also makes several simplistic and erroneous assumptions regarding the predictability of sex-offender recidivism. While a State may elect to limit public disclosure of sex-offender registration information based on an offender's perceived risk of reoffending, there is ample evidence which supports Alaska's approach. In any event, where, as here, a State legislature acts in response to a problem of manifest concern, the *ex post facto* clause does not require that empirical evidence support every aspect of the legislative approach.

B. ASORA Is Not Punitive In Effect

ASORA's registration provisions serve a legitimate regulatory function. "Sex crimes flourish in secrecy [and] [s]ex offenders have secretive and manipulative lifestyles. . . ." English, *Managing Adult Sex Offenders in the Community*, at 2. "The vast majority of sex offenders are released eventually" to the community, where they are presented with the opportunity to reoffend. *See* Prentky, *Child Sexual Molestation*, at 8. "[M]anag[ing] sex offenders in the community to

contain them" is thus essential to protect the offenders' previous victims and potential new victims. *See* English, *Managing Adult Sex Offenders in the Community*, at 2.

Requiring sex offenders to register with law enforcement authorities prior to their release from prison and upon moving into, or within, the State, serves this protective purpose in two critical ways. First, it alerts authorities to the presence of a sex offender in their jurisdiction. Second, it alerts the sex offender to the fact that the authorities know where the offender lives and works, as well as the motor vehicles to which the offender has access. Registration thus reduces the ability of an offender to operate in secrecy, an environment conducive to the commission of new sex offenses.

The court of appeals further ignored that ASORA is an integral part of a national program to track the whereabouts of sex offenders. Under the act, sex offenders must also notify the authorities when they move out of the State, *see* Alaska Stat. § 12.63.010(c), and Alaska authorities must notify both the FBI and law enforcement authorities in "the state where the sex offender . . . is moving of the sex offender's . . . intended address." *Id.* § 12.63.030(a); *see also* 42 U.S.C. § 14071(b)(2) (requiring "[t]he State law enforcement agency [to] immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation") & (b)(4) ("The . . . law enforcement agency shall, if the person changes residence to another State, notify the law enforcement agency with which the person must register in the new State, if the new State has a registration requirement.").

The Court has frequently recognized the highly mobile nature of modern society. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 498-501 (1999). Moreover, as explained above, research clearly establishes that many sex offenders commit recidivist acts for decades after their release. *See* discussion *supra* at 12 (finding that some offenders commit acts 20 years after release). Exempting the large number of offenders who

committed sex offenses before the 1994 effective date of Alaska's statute (as well as those of every other State) on the ground that registration violates the *ex post facto* clause would severely curtail an important national program to track the whereabouts of released offenders.[12]

The court of appeals thus discounted the important remedial interests of Alaska as well as every other State in protecting their citizens. To reach this result, the court reasoned that ASORA's registration requirements are "onerous," Pet. App. 13a, 14a, 19a, and impose an "extremely burdensome" and "substantial disability" because they "require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants and annually for 15 years in the case of others." *Id.* at 28a; *see also id.* at 30a. Moreover, the court likened the registration obligations "to the duty imposed in a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release." *Id.* at 19a-20a.

The court of appeals' analysis is based on an erroneous construction of the statutory language, which, as the court acknowledged, "on its face, does not clearly specify that these registrations must be made in person at local police stations." *Id.* at 7a n.4.[13] In fact, the registration provisions applicable

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[12] While under the Ninth Circuit's analysis the registration obligations of other States may survive constitutional challenge, *see Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998), the court's invalidation of ASORA poses a substantial threat to the national scheme. If Alaska sex offenders who committed their acts prior to ASORA's enactment are not required to register, these offenders will be able to move to other States without giving notice to Alaska officials. In turn, Alaska officials will not be able notify other States that Alaska offenders have moved into their jurisdiction.

[13] The court of appeals based its misreading on Alaska's representation at "oral argument that periodic in-person registration at local police

to each category of sex offender state that "[a] sex offender . . . required to register . . . *shall* . . . *provide written verification to the department* . . . of the sex offender's . . . address and notice of any changes to the information previously provided . . . ." Alaska Stat. § 12.63.010(d)(1) (emphasis added); *see also id.* at § 12.63.010(d)(2) (referring to "written verification"). Furthermore, in an informational pamphlet, the Alaska Department of Public Safety clearly states that "[t]he initial registration must be done in person. Notices of change of address, annual and quarterly verifications may be done by mail." Sex Offender/Child Kidnapper Central Registry, Alaska Department of Public Safety, *Information Pamphlet Concerning Sex Offender/Child Kidnapping Registration in Alaska* (2001) (available at http://www.dps.state.ak.us/nSorcr/pdf/SORPamphlet.pdf).[14]

The court of appeals' construction of ASORA's registration requirement is thus patently erroneous. After the initial registration, the periodic written verification and updating required upon "chang[ing] residence" impose a minimal burden on offenders, which is consistent with the regulatory nature of the scheme.

Moreover, ASORA's requirements do not remotely approach the conditions or restrictions typically imposed on an offender placed on probation or granted supervised release. ASORA does not prohibit a sex offender from

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stations is required by the Act." Pet. App. 7a n.4. The State has explained that its lawyer's representation was a mistaken response to a question at oral argument regarding whether ASORA requires registrants to "'go to the police station' for their annual or quarterly registrations." *Id.* The State subsequently made clear to the court of appeals that its lawyer had made a mistake and other documents indicate that the State does not construe the statute as requiring in-person verification. *See* Pet. for Rehearing en Banc (9th Cir., dated Apr. 20, 2001) at 10-11.

[14] This pamphlet is provided by the Department of Public Safety "for information purposes only" and refers users to Alaska Stat. § 12.63.

engaging in any activity or require compliance with any condition other than registering and updating or verifying information. For example, it does not require that the offender make periodic visits to supervising officers, obtain approval of employment or choice of residence, submit to polygraph testing, "abide by a curfew," "comply with electronic monitoring," "maintain a driving log," "abstain from alcoholic beverages and participate in periodic drug testing," or participate in "treatment with a therapist." English, *Managing Adult Sex Offenders*, at 5. Nor does it prohibit offenders from "frequent[ing] places where children congregate," "hav[ing] contact . . . with . . . victims," "driv[ing] a motor vehicle alone without prior permission," or "possess[ing] any pornographic, sexually oriented, or sexually stimulating" material "relevant to [the offender's] behavior pattern." *Id.* ASORA's registration and verification obligations thus bear no resemblance to the conditions and restrictions that typically accompany probation or parole. *See* Leonard Orland, *Justice, Punishment, and Treatment* 485-86 (1973) (reproducing parole certificate); *id.* at 491 (listing parole conditions).

ASORA likewise does not impose "an 'affirmative disability or restraint,' as that term is normally understood." *Hudson v. United States*, 522 U.S. 93, 104 (1997). ASORA does not prohibit an offender from voting, holding public office, or bar an offender from a profession or holding an occupational license. *See Hawker v. New York*, 170 U.S. 189 (1898); *see also DeVeau v. Braisted*, 363 U.S. 144 (1960).[15] Moreover, ASORA does not subject sex offenders to commitment to a facility for treatment. *See Hendricks*, 521 U.S. at 363. The

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[15] In *Hudson* the Court held that debarment from a profession does not "involve an 'affirmative disability or restraint.'" 522 U.S. at 104 (citation omitted). The Court has long held that retroactive occupational debarment does not impose punishment in violation of the *ex post facto* clause. *See Hawker*, 170 U.S. at 200.

obligation to register and periodically verify "is 'certainly nothing approaching the "infamous punishment" of imprisonment.'" *Hudson*, 522 U.S. at 104 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

Notwithstanding that ASORA does not prohibit any conduct other than failing to register, verify, or update address information upon moving, the court of appeals reasoned that the statute's notification provision also "impose[s] an affirmative disability" because it "subjects [sex offenders] to community obloquy and scorn that damage them personally and professionally." Pet. App. 14a. The court further stated that ASORA "procedures . . . are likely to make the plaintiffs *completely* unemployable." *Id.* at 16a. The court of appeals assumed that because "Alaska publishes the names and addresses of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment[,] . . . it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." *Id.*

This conclusion is faulty for several reasons. First, while compliance may result in the loss of some employment opportunities, the entries of numerous registered sex offenders indicate that they have obtained employment notwithstanding that ASORA has been in effect for nearly a decade. These entries negate the court of appeals' assumption that ASORA is "likely to make the plaintiffs *completely* unemployable." *Id.* at 16a. The fact that one sex offender suffered a loss of business attributable to ASORA's public access provision, *see id.* at 14a-15a, does not establish the court's hypothesis of a consumer boycott rendering all sex

offenders completely unemployable.[16] It likewise ignores the existence of employment opportunities in businesses that do not sell directly to the public.

Second, insofar as some sex offenders are denied certain employment opportunities, this condition does not arise from a statutory prohibition on employment but from the decisions of private employers. Difficulty obtaining employment has long been a consequence of a conviction for a serious felony. Indeed, many employers conduct criminal background checks of prospective employees. Moreover, the records of judicial proceedings, including records of convictions for a crime, are public records in Alaska. *See* Alaska Admin. Code tit. 13, § 68.310. While Internet publication makes a sex offender's criminal history more readily accessible, and thus may prompt more employers to use the registry, the State is not responsible for the disinclination of many employers to hire convicted felons. Internet publication thus does not impose "an 'affirmative disability or restraint,' as that term is normally understood." *Hudson*, 522 U.S. at 104.

The court of appeals also reasoned that ASORA imposes a disability because it "exposes all registrants to world-wide obloquy and ostracism." Pet. App. 29a. This argument is not persuasive. While Internet publication allows people anywhere in the world to view the entries in Alaska's sex offender registry, the court's contention ignores that the sex

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[16] The court of appeals observed that "the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration . . . website were publicly distributed and posted on bulletin boards." Pet. App. 14a-15a. *Hawker*, however, establishes that the *ex post facto* clause is not violated by a statute retroactively barring a felon from a lucrative profession. *See* 170 U.S. at 200 (barring convicted felon from practicing medicine); *see also Hudson*, 522 U.S. at 104 (holding that debarment from participating in banking industry was not punitive).

offense information merely relates the historical fact of a conviction obtained through procedures that provide substantial safeguards. Moreover, the court did not explain how those persons who live outside Alaska and have no contact with an offender can engage in ostracism merely by viewing Alaska's website or how an offender can feel ostracized by persons thousands of miles away whom he has never met.

C. ASORA's Lack Of Individualized Risk Assessment Does Not Render It Punitive

In holding that ASORA is punitive in effect, the court of appeals also concluded that the statute is "excessive in relation to its public safety purpose," Pet. App. 23a, because its application to an offender is not limited based on an individualized assessment of the risk that an offender will engage in recidivism. *See id.* at 23a-27a, 29a. ASORA's lack of risk-based assessment does not render the scheme punitive because individualized risk assessment is not a constitutionally required precondition of sex offender registration and disclosure schemes. *Cf. Hendricks*, 521 U.S. at 360 n.3 (quoting *Jones*, 463 U.S. at 365 n.13) ("when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'"). The court of appeals' decision erroneously assumes a degree of predictive accuracy that is not supported in the literature and ignores research which supports Alaska's approach. The faulty premises which underlie the court's reasoning demonstrate why difficult and controversial policy decisions such as this one should be made in legislative bodies, which have superior fact-finding capabilities, rather than the courts.

The first of these is the undue faith the court of appeals placed in clinical assessment of the respondents. In particular, the court observed that a state court had granted Doe I custody of his daughter based "on the findings of psychiatric evaluations concluding that Doe I has 'a very low risk of re-

offending' and is 'not a pedophile.'"[17] Pet. App. 4a. *See also id.* at 27a (explaining that even though "Doe I was successfully rehabilitated" and that "a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. . . . Doe I would be forced to submit to" the statute).

In contrast to the court of appeals' view, there is substantial research which suggests that individualized risk assessments have low predictive accuracy. R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Pol'y, & L. 50, 54 (1998). One expert writes that "[a]lthough clinical predictions of risk are routine in many fields, the accuracy of these risk assessments has been unimpressive." *Id.* (citations omitted). In this expert's view, "[t]he clinical prediction of sexual offender recidivism is no exception." *Id.* Hanson and another expert have concluded that "the average predictive accuracy of professional judgment to predict sex offense recidivism is only slightly better than chance." R. Karl Hanson & David Thornton, *Static 99: Improving Actuarial Risk Assessments for Sex Offenders* (1999) (available at http://www.sgc.gc.ca/epub/Corr/e199902/e199902.htm); *see also* Hanson, *Sex Offender Risk Assessment*, at 54.[18]

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[17] Contrary to the assumption of the court of appeals, "[t]he majority of incest abusers—whether they are men or women—are not true pedophiles. Nevertheless, they can be addicted to sex, and a significant number also sexually assault children outside their families." Freeman-Longo, *Sexual Abuse in America*, at 42.

[18] There is some evidence suggesting that clinical assessments which are structured to review a standardized list of risk factors have greater predictive accuracy than unguided clinical assessments. *See* Hanson, *Sex Offender Risk Assessment*, at 55. Hanson found an average correlation of .23 for guided clinical assessments versus a correlation of .07 for unguided assessments. *See id.* There is, however, "no explicit method of translating combinations of individual risk factors into overall recidivism

Moreover, while it has been suggested that actuarial methods of risk assessment are superior to clinical prediction, *see* Virginia Criminal Sentencing Commission, *Assessing Risk*, at 14 (summarizing literature), "[a] longstanding controversy exists within the field of psychology over the relative merits of actuarial (or statistical) versus clinical predictions." Thomas R. Litwack, *Actuarial Versus Clinical Assessments Of Dangerousness*, 7 Psych., Pub. Pol'y, & L. 409 (2001). In any event, although "researchers have made significant advances in risk assessment procedures" with respect to the prediction of "general criminal recidivism," Hanson, *Sex Offender Risk Assessment*, at 50, "these general measures have not been particularly effective in predicting sexual recidivism." *Id.* at 52. In part, this is because "[t]here has been relatively little empirical research on how best to combine risk factors for sexual offenders." *Id.* at 62; *see also id.* at 63-64 (discussing use of various actuarial scales).

The current actuarial methods—which rely principally on static factors—have at best moderate predictive accuracy with respect to sex offenses.[19] *Id.* at 63-64. These scales, however, "cannot even claim to address all the relevant static risk factors," *id.* at 65, and "a reliable set of dynamic risk factors has yet to be established." *Id.* at 68. As Hanson further explains, "[t]he research on dynamic risk factors for sexual offenders is just beginning, and many of the effects need to be replicated before they can be confidently used to predict

probabilities" and "[n]one of the individual risk factors are sufficiently discriminating to justify their use in isolation." *Id.* at 62.

"Correlation coefficients can range from –1 to +1, with 0 indicating no predictive accuracy and values farther from 0 indicating greater predictive accuracy." *Id.* at 53. Thus a correlation of +1 indicates a perfect positive correlation between variables and –1 indicates a perfect negative correlation.

[19] The correlations range from .20 to .33. *See* Hanson, *Sex Offender Risk Assessment*, at 63-64.

risk." *Id.* Thus, "the research on actuarial measures for sexual offense recidivism has yet to demonstrate a clear superiority to the best clinical assessment methods." *Id.* at 53.

As the foregoing demonstrates, there is substantial research which challenges the court of appeals' assumption that predictions of sex-offender recidivism can be made with a high degree of accuracy. To be sure, it may be possible to devise risk assessment procedures which can determine those offenders with the highest risk of reoffending with a high degree of predictive accuracy. *See, e.g., Assessing Risk Among Sex Offenders In Virginia*, at 89-90.[20] However, to the extent the threshold for classifying an offender as a high risk is set at a high level to "reduc[e] the rate of false positives," it may "lower the rate at which recidivists are accurately identified by the model." *Id.* at 91. Faced with the uncertainty inherent in predicting sex offender recidivism, a State can reasonably choose—as Alaska has—to make relevant information available to its citizens without an individualized risk assessment. That a State does so does not make its scheme punitive.

The fact that "recidivism [rates] vary considerably depending on the specific sex offense committed," Pet. App. 25a n.10 (citation omitted), likewise does not make ASORA a punitive scheme. Indeed, respondents, who were each charged with multiple acts of incest against their children, *see*

[20] In developing its risk assessment scale, the Virginia Criminal Sentencing Commission "chose as its operational definition of recidivism a new arrest for *any crime against a person*, including any new sex offense." *Assessing Risk Among Sex Offenders In Virginia*, at 44 (emphasis added). The instrument is thus not solely a predictor of sex offense recidivism. *See* Hanson, *Sex Offender Risk Assessment*, at 50-51 (noting that "[t]here is no longer any serious debate about whether general criminal recidivism can be predicted" and "there appear to be some differences between the factors that predict sexual offenses and the factors that predict other types of violence").

Brief for Appellees at 4 (9th Cir.), have made no showing, let alone provided "'the clearest proof,'" *Hendricks*, 521 U.S. at 361 (citation omitted), that ASORA's application to them does not serve a legitimate regulatory purpose. Even if it could be conclusively established that the recidivism rate for incest offenders was substantially below that of non-incest offenders, whether such offenders should be subject to registration and disclosure is a matter for legislative determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 01-729

In the
Supreme Court of the United States

RONALD O. OTTE AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, IN SUPPORT OF PETITIONERS

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22 pgs

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Pursuant to Supreme Court Rule 37.3(b), The Reporters Committee for Freedom of the Press and move this Honorable Court for leave to file an *amicus curiae* brief in support of the Petitioners. The brief *amicus curiae* follows this motion.

Petitioners have consented to the filing of the attached brief; Respondents have withheld consent.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amicus is concerned with a subsidiary issue in this case; specifically, whether the dissemination of information can be considered a "punishment." The Ninth Circuit's ruling in this case is troubling because it implies that the dissemination of information, much of which is contained in a public record, could be deemed a "punishment" and restricted for that reason. Amicus is concerned that the Ninth Circuit's interpretation of the law could result in overbroad restrictions on the dissemination of information contained in public records.

The petitioners' speak from the perspective of government officials, while amicus is concerned with the effect on the news media. The interests of the two are not the same, and amicus wish to write separately to emphasize the implications of this decision for a free press. Given the ramifications of a

decision in this area for First Amendment and access interests, *amicus curiae* respectfully requests that this Court grant it leave to file the attached brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has a strong interest in a subsidiary issue in this case: whether the dissemination of information contained in government records can properly be classified as "punishment." Placing restrictions on the dissemination of information about those who have been convicted of crimes potentially infringes on the First Amendment rights of the public and press, and limits the ability of the public to oversee the workings of its government.

Amicus takes no position on the issue of whether the registration requirements of the Alaska law are valid. *Amicus*' interests lie solely in the interpretation of the "notification" portion of the statute.

Regardless of any other holding the Court may make in this case, *amicus* urges this Court to find that the dissemination of information contained in government records cannot properly be classified as "punishment."

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Consent to file this brief was not obtained from the Respondent; a motion for leave to file this brief precedes this section.

SUMMARY OF ARGUMENT

Sex offender notification laws do not violate the Ex Post Facto Clause of the U.S. Constitution because they do not increase the punishment for a crime. Criminal convictions are a matter of public record, and members of the public already have the right to look up conviction information at the courthouse. The public nature of the conviction has not changed merely because the public is now permitted to look up the conviction information in another format.

The means of dissemination should not be a factor in determining whether the notification portion of the Alaska statute is valid. Making information available on the Internet is as legitimate as providing it at a police station or other government office. The notification provision is not invalid merely because the information is available to any interested member of the public. There has never been a requirement that conviction information be restricted to only a small group of "professionals" or experts.

The goal of the law is not to "punish" but to provide information to help the public protect itself. This goal is not outweighed by the embarrassment that may come to a convicted offender. The risk of embarrassment existed prior to the enactment of the law, as conviction information was already a matter of public record.

Any potential risks to the convicted offenders, such as vigilantism, or discrimination in housing or employment, are better remedied by enacting or enforcing laws barring such conduct. Restricting access to conviction information would be far more dangerous, as it would permit dangerous offenders to take advantage of the public's ignorance.

Amicus does not take a position on whether the

registration requirements in the statute are valid.[2]

ARGUMENT

I. Release of government information in a sex offender registry does not violate the Ex Post Facto clause of the U.S. Constitution.

Numerous state and federal courts have considered whether sex offender registry laws constitute an Ex Post Facto law. While the vast majority of sex offender registry laws have been found to be constitutional,[3] two have not.[4]

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[2] *Amicus*' concern is solely with the notification portion of the statute, not the registration requirement. *Amicus* recognizes that there are certain issues that arise because of the registration requirement that are not otherwise addressed herein. For example, the state requires registrants to provide information that may not have been in the original conviction record, such as current address and employer. *Amicus* takes no position on whether it is appropriate for the state to require a registrant to provide such information. However, once the information is collected, assuming this Court finds that the state may collect such information, it should be made available along with the conviction information that was part of the original criminal record because such information is necessary for the public to correctly identify the convicted offender and distinguish him from other citizens with the same name. It also aids the public in self-protection. The fact that additional information may be required upon registration should not be used to invalidate the notification portion of the statute, because it is still the publication of the *conviction* that the offenders wish to avoid.

[3] *See*, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235

(continued...)

Almost all of the laws have two components: a registration requirement and a notification provision. Some courts have evaluated the two components together, others have evaluated them separately.

In this case, the Ninth Circuit noted that it considered the two components together, finding that the law, as a whole, was an Ex Post Facto law in violation of the constitution. *Amicus*, however, will address only one component: the notification provision. *Amicus*' primary concern is the Ninth Circuit's suggestion that it is a "punishment" to provide convenient public access to material that is presumptively already part of a public record.

Amicus does not claim that states must provide internet sex offender registries or draft a "Megan's Law" in any particular way. *Amicus* contends only that those states that choose to provide information via the Internet may do so without violating the Constitution.

A. The law does not violate the Ex Post Facto Clause because convicted sex offenders already had "fair warning" that the public would be

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[3](...continued)
(3d Cir. 1996); *Snyder v. State*, 912 P.2d 1127 (Wyo. 1996); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); *State v. Costello*, 643 A.2d 531 (N.H. 1994); *State v. Ward*, 869 P.2d 1062 (Wash. 1994); *State v. Noble*, 829 P.2d 1217 (Ariz. 1992); *Patterson v. Alaska*, 985 P.2d 1007 (Alaska Ct. App. 1999); *Williford v. Bd. of Parole*, 904 P.2d 1074 (Or. App. 1995); *People v. Starnes*, 653 N.E.2d 4 (Ill. App. 1995); *State v. Manning*, 532 N.W.2d 244 (Minn. App. 1995).

[4] See *Kansas v. Myers*, 923 P.2d 1024 (Kan. 1996) and the Ninth Circuit's decision in the present case, *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

permitted to access information about their convictions.

Ex Post Facto laws are disfavored because law should give the public "fair warning" of what is prohibited and how improper conduct will be punished. *Doe v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001); *Doe v. Pataki*, 120 F.3d 1263, 1273 (2d Cir. 1997). The notification provision of sex offender registry laws do not violate this principle. Under the open American court system, any accused person knows that the trial will be a public trial and any potential conviction will be a matter of public record. A convicted sex offender — or any convicted criminal — cannot credibly argue that he lacked "fair warning" that the public may learn of his conviction.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court ruled that the public and the press have a First Amendment right to open criminal trials. Since then, this Court has consistently affirmed the presumptive right of access to many aspects of a criminal proceeding. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that statute mandating closure of courtrooms during minor victims' testimony was unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (reversing California state court's closure of voir dire); *Waller v. Georgia*, 467 U.S. 39 (1984) (closure of criminal suppression hearing was overbroad and unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (finding qualified right of access to pretrial hearings, and noting that First Amendment scrutiny must be applied); and *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (closure of preliminary hearing was unconstitutional).

This Court has cited numerous policy reasons in favor of open court proceedings, recognizing that our justice system does more than merely punish criminals. Providing access to

and information about criminal proceedings ensures "the proper functioning of a trial." *Richmond Newspapers*, 448 U.S. at 569. Access allows "the public to participate in and serve as a check upon the judicial process -- an essential component of our structure of self government." *Globe Newspapers*, 457 U.S. at 606. Public scrutiny also promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against "any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1984). Openness also enhances public confidence in judicial proceedings. *Press Enterprise I*, 464 U.S. at 509. Finally, open proceedings have a "community therapeutic value." *Richmond Newspapers*, 448 U.S. at 571. Open proceedings provide an outlet for the public's concern and emotions that result from criminal acts. Openness also vindicates the concerns of the victims of crime, the community and defendants in knowing that the criminal system operates fairly and justly. *Press-Enterprise I*, 464 U.S. at 509.

The principles outlined in *Richmond Newspapers* and its progeny present a clear picture of the values associated with the American legal system. Those who are accused of crimes are given numerous protections to ensure that their trials are fair. The public is given the opportunity to oversee the justice system and ensure that powers are not abused. And victims and communities are provided with a mechanism to help overcome the damage caused by criminal activity. Each of these principles are further supported by permitting the dissemination of information about criminal proceedings, even after the trial has ended. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (finding a common law right of access to judicial records).

The fact that criminal court records are open to the public means that information about the sex offender's conviction

would be available to the public even without a registry law. *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263, 1280 (2d Cir. 1997); *Patterson v. Alaska*, 985 P.2d 1007, 1016 (Alaska App. 1999). Thus, allowing access to information about their convictions can hardly be an Ex Post Facto "punishment," as access to information about any criminal conviction was a fundamental attribute of the justice system at all times in American history. *Id.*

The Ninth Circuit has now determined that the public access to such a conviction is an "increased punishment" for the purpose of the prohibition against Ex Post Facto legislation. But the law does not increase the penalty. The threat of public knowledge of one's crime has always been present. Such a ruling cannot stand where the conviction was a matter of public record:

> [T]he historical evidence demonstrates conclusively that at the time when our organic law were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial.

Richmond Newspapers, 448 U.S. at 569. Thus, regardless of when the Respondents were convicted of their crimes, they should have expected that their convictions would be a matter of public record, available to any member of the public for any reason. Allowing access to information about their convictions can hardly be an Ex Post Facto "punishment." The information was available to the public at the time of their conviction, and would continue to be available under the notification portion of the act.

B. The sex offender notification laws do not constitute an Ex Post Facto punishment because dissemination of information has never been regarded as punishment when done in furtherance of a legitimate government interest.

The analysis *amicus* supports was applied by the Tenth Circuit in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, a convicted sex offender challenged Utah's notification law, claiming that it was an Ex Post Facto punishment. The law permitted public access to sex offender registry information and provided access via the Internet. The court rejected the offender's arguments, finding that notification was not a punishment.

The court noted that "the threshold inquiry for assessing a violation of the Ex Post Facto Clause . . . is whether Utah's Internet notification program constitutes additional criminal punishment for the crimes previously committed by those subject to its provisions. . . . If the notification measures are deemed civil rather than criminal in nature, they present no ex post facto violation." *Femedeer*, 227 F.3d at 1248 (*citing Kansas v. Hendricks*, 521 U.S. 346, 371 (1997)).

The court found that the notification law did not impose a disability or restraint traditionally associated with a "punishment." Under the law, convicted offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire." *Id.* at 1250. Although notification may result in negative consequences, such consequences are not part of a punishment imposed by the state, but rather part of the legitimate procedures we use for open government:

> Dissemination of information about criminal activity has always held the potential for substantial negative consequences for those involved in that activity. Dissemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate government interest. When there is probable cause to believe that someone has committed a crime, our law has always insisted on public indictment, public trial, and public imposition of a sentence, all of which necessarily entail public dissemination of information about the alleged activities of the accused.

Id. at 1251 (*quoting E.B. v. Verniero*, 119 F.3d 1077, 1099-1100 (3d Cir. 1997)). *See also*, *Cutshall v. Sundquist*, 193 F.3d 466, 475 (6th Cir. 1999) ("The Act provides for the collection and dissemination of information; [the convicted offender] has not cited, and we have not found, any evidence that dissemination of information has historically been considered punishment.").

The Tenth Circuit also correctly noted that, as a practical matter, notification does not impose the information upon the public, but merely makes it available for interested persons to review.

> Under Utah's law, registry information is made widely available, but it is not broadcast in a manner approaching the historical examples of public shaming. Interested individuals must still make an affirmative effort to retrieve the information. Internet notification works merely a technological extension . . . in our nation's long history of making information public regarding criminal offenses.

Femedeer, 227 F.3d at 1251.

Thus, the court concluded that providing access to information provides legitimate civil benefits, consistent with our tradition of allowing public access to criminal case information, and the notification law cannot therefore be

deemed a "punishment" in violation of the Ex Post Facto Clause. *Id* at 1253.[5]

C. The scope of notification permitted by the Alaska statute is irrelevant.

One of the recurring issues in sex offender registry cases is the scope of the notification provision. Courts have been likely to find that the notification provision does not constitute a "punishment" when the notification is limited. *See, e.g. Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (finding Washington state's registry law to be constitutional where notification is limited by a threat classification and by geographic area). Other courts have found that the scope of notification is irrelevant. *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (finding that Utah's law allowing unrestricted internet access to sex offender registry information is constitutional).

In the present case, the Ninth Circuit found that the notification provision constitutes a "punishment" because it is not limited in scope.

The Ninth Circuit ruled the Ex Post Facto Clause prohibits states from enacting laws that change a punishment or inflict a greater punishment than the law applied to the crime at the time it was committed. *Doe v. Otte*, 259 F.3d 979, 984-85 (9th Cir. 2001) (*citing Calder v. Bull*, 3 U.S. 386 (1798)). But the fact of a sex offender's conviction and the information pertaining to his conviction were matters of

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[5] The Tenth Circuit also ruled that the plaintiff could not pursue his claim anonymously, as anonymity would violate the principle that court proceedings should be open and provide information to the public.

public record available to the public at the time of his conviction. The state has now provided an alternate method of permitting the public to research the same information. The fact that the new method of research may be easier and more convenient for the public does not mean that there is an "increased punishment" for the convicted offender.

The "notification" portion of the act does not mean that the state affirmatively notifies the public of the offender's information; it merely makes the information available for interested persons to review. As the Tenth Circuit noted, the information is not broadcast. Interested individuals must still make an affirmative effort to retrieve the information. *Femedeer*, 227 F.3d at 1251.

In essence, the notification provision permits a citizen to research public records more simply. Prior to the enactment of the law, the interested person would have to go to the courthouse and look through files to see who had been convicted of a sex offense or look up a certain person by name. Now, the state has that information available in one searchable database. The research process has been made easier, but by no means is the offender's name being broadcast all over the community.

The Ninth Circuit thought that the state should make a distinction between sex offenders who have been adjudged likely to offend again and those who have not, and should impose other limits on notification. The court implied that it is possible for a cadre of "experts" to figure out who will offend again and the state should notify the public only when there is a reason to believe the convicted felon will offend again. However, such a requirement is neither reasonable nor necessary. Experts, while they may have plenty of experience to make judgments, are not seers. Legislatures have passed notification laws to permit the public to protect themselves, precisely because the state cannot protect all citizens in all

places at all times. Limiting the flow of information to those places and people who the state deems "at risk" wholly invalidates the underlying principle of the notification laws.

D. The law fulfills non-punitive goals, which are not overcome by potential difficulties to known offenders.

In this case, the Ninth Circuit recognized that there is an important non-punitive goal to be achieved by the law: protecting the public. *Doe v. Otte*, 259 F.3d 979, 991 (9th Cir. 2001).

The primary argument against public notification seems to be that there may be negative consequences resulting from notification, such as inability to find a residence or a job, due to public reaction. These, consequences, however, are not government imposed, nor are they required "punishment." But most importantly, they are consequences that could have resulted even before the passage of the registry law.

As the Ninth Circuit noted in a previous case, "the potential ostracism and opprobrium that may result from notification is not inevitable." *Russell*, 124 F.3d at 1092. The court also found that its "inquiry into the law's effects cannot consider the possible 'vigilante' or illegal responses of citizens to notification." *Id.* Although there are undoubtedly possible negative consequences resulting from public access to sex offender registries, such consequences are not beyond the consequences that may result from the existing public access to the original conviction records. Notification provisions merely make it easier for the public to obtain the already-public information by permitting an interested person to quickly review one database rather than having to look through numerous records. Public access to the information has not changed, and making public access easier does not

"enhance" the penalty or consequences to the convicted offender.

In *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), the convicted offenders argued that the law constituted a "punishment in fact" because notification had damaging effects on their lives, including ostracism, threats of violence, arson, eviction and other physical attacks. *Id.* at 1278-79. However, the court correctly noted that such consequences could not be fairly attributed to the law itself. Although any given member of the public might not have known of the offender's conviction "but for" the law, the resulting incidents were not imposed by the law:

> The incidents (1) are wholly dependent on acts by private third parties, (2) result from information most of which was publicly available prior to the [notification law], and (3) flow essentially from the fact of the underlying conviction.

Id. at 1280. The Second Circuit recognized that most of the information available under the notification provision of the law was publicly available from other sources. The court also recognized that a convicted criminal must expect some negative consequences from his conviction, even after his sentence is complete:

> The societal consequences that flow from a criminal conviction are virtually unlimited. Individuals may lose their jobs or be foreclosed from serving in future professions; their marriages are destroyed; they may be plunged into poverty. Some individuals may be deported, . . . and others may lose their homes. . . . Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities.

Id (ellipses in original). The court recognized that hostile acts

against convicted sex offenders may therefore occur, but they are nevertheless illegal and not condoned by the statute. *Id.* The purpose of the statute is to inform the public and permit them to take reasonable action to protect themselves; anticipated action — such as preventing one's children from being alone with an offender — is reasonable and appropriate to achieve nonpunitive ends. *Id.* Thus, the court found that "[w]hatever incremental burdens upon convicted sex offenders arise from public notification are not 'so disproportionately severe and so inappropriate to nonpunitive ends' as to constitute punishment." *Id.*

In this case, Respondents' argument seems to be that it is embarrassing for information about their sex offender status to be readily available to the public. The question, however, is whether their embarrassment is a punishment.

It is logical and reasonable to expect a person who has been convicted of a crime to be embarrassed by the conviction. And only the most perverse members of society would *not* be embarrassed by a conviction for a sexual offense. But, presumably, such embarrassment is part and parcel of the initial conviction and the inherently public nature of the initial criminal trial.

The fact that members of the community may become aware of an offender's conviction in the future, causing additional embarrassment, cannot be said to be an additional punishment. Any convicted criminal, for any offense, will always run the risk of embarrassment when others learn of the conviction. Such discomfort cannot be escaped, nor should the government be expected to ease their concerns by helping offenders hide — or keep as non-public as possible — the existence of their conviction.

Committing a crime is an inherently public act. It affects other members of the public, it is prosecuted by the public, in

a public courtroom, in the public's name. To claim that the fact of conviction is somehow entitled to be kept from the public is incomprehensible.

The interests favoring the sex offenders, such as preventing vigilantism, ostracism or vengeance, can more appropriately be met with remedies tailored to those interests and without infringing on the public's right of access to public information. The states could enact laws that prevent discrimination in housing or employment based on sex offender status, and they could prosecute any citizen that attacks or otherwise harms a sex offender due to his or her status. But the state should not be forced to limit the dissemination of information about crimes, especially when the original material is a matter of public record.

E. Ruling that the dissemination of information can be a "punishment" may result in undesirable results.

If this Court were to rule that the dissemination of information could be deemed a "punishment," *amicus* is concerned that the ruling may be used as a basis for limiting access to criminal court records or other materials that are otherwise available to the public. It may limit states from providing information under state laws governing access to government records, which could result in terrible consequences.

For example, parents and childcare employers regularly use criminal court records to determine whether childcare applicants have prior convictions for sexual abuse of minors or other violent crimes. If the release of such information could be a "punishment" and access to the information was therefore restricted, private childcare employers would not be able to determine which applicants pose a risk. Convicted

felons may not voluntarily reveal their conviction, and private persons would have no other means of checking their background.

As noted above, any concerns regarding improper discrimination in employment or housing would be better remedied by legislation outlawing such discrimination. But the dissemination of information should not be restricted.

CONCLUSION

Amicus takes no position with regard to the registration requirement of the law at issue, but respectfully requests that this Court find that the notification portion of the law is constitutional. The notification portion of the law does not violate the Ex Post Facto Clause of the U.S. Constitution because it does not increase the punishment for the crime committed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

GLENN G. GODFREY AND BRUCE M. BOTELHO, *Petitioners,*

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II, *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AND THE STATE OF COLORADO EX REL. KEN SALAZAR, ATTORNEY GENERAL, AND THE 41 STATES AND TERRITORIES OF ALABAMA, ARIZONA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA* AS AMICI CURIAE IN SUPPORT OF PETITIONER, THE STATE OF ALASKA

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QUESTION PRESENTED

Alaska's sex offender registration act requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The department elected to publish the information on the Internet. This procedure raises the following question:

Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the Ex Post Facto Clause of the United States Constitution?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-729

GLENN G. GODFREY AND BRUCE M. BOTELHO, *Petitioners,*

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II, *Respondents.*

The Amici States file this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE AMICI CURIAE

This brief is respectfully submitted in support of Petitioner, the State of Alaska, and urges reversal of *Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001). In an opinion authored by Judge Reinhardt, the Ninth Circuit Court of Appeals held Alaska's sex offender registration and notification laws violated the Ex Post Facto Clause of the United States Constitution, reversing the decision of the Alaska district court.

All the states have a compelling interest in monitoring the whereabouts of convicted sex offenders, facilitating the investigation of sex crimes, and in disseminating information about registered sex offenders to protect the public. All 50 states require registration by sex offenders, and most have some form of community notification regarding sex offender registrants. Thirty states and the District of Columbia use the Internet to disseminate information about registered sex offenders, and one other state has authorized the creation of an

Internet website. Those states which do not place their sex offender registries on the Internet use a variety of other methods for notification, including making registries available at local law enforcement offices, personal notice, flyers, the news media, state-sponsored telephone lines, and mailed notices.

The states have a strong interest in preventing reoffense by convicted sex offenders, and in reducing the number of victims of sex crimes. The impact on society of sexual abuse is incalculable, its effects often devastating not only to the victim of the immediate crime, but to future generations.

SUMMARY OF ARGUMENT

The differences in the states' laws on sex offender registration and notification are not material for purposes of an ex post facto analysis. No state's law is so punitive in effect that it nullifies legislative intent that the laws constitute a regulatory scheme enacted for the protection of public safety. Although some states have chosen to place limits on the scope, extent and manner of sex offender notification, other states are not mandated by the federal Constitution to enact similar restrictions. The most important factor in the ex post facto analysis is the fact that the states' sex offender registration and notification laws were enacted to serve important nonpunitive goals, based on appropriate decisions by state legislatures balancing the interests of individual sex offenders with societal risks. Respondents cannot demonstrate by the clearest proof that sex offender registration or notification laws are punitive in either purpose or effect.

ARGUMENT

NO STATE'S LAW ON SEX OFFENDER REGISTRATION OR NOTIFICATION IS SO PUNITIVE IN EFFECT AS TO OVERRIDE LEGISLATIVE INTENT THAT THE LAWS BE REGULATORY

Over the past two decades, the states have confronted the danger of recidivism by sex offenders through the enactment of registration and notification laws. These laws vary in their scope, extent and manner. But all are directed to the remedial purpose of preventing future offenses by providing information to law enforcement agencies and the public. Typically, this is information that is already available to the public in different forms.

In our federal system, the states are afforded wide latitude in assessing the risk posed by prior offenders and in fashioning laws designed to provide for public safety. *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3, 117 S.Ct. 2072, 2081 n.3, 138 L.Ed.2d 501, ___ (1997). Deference to the states' exercise of their police powers is an integral part of the ex post facto analysis: a state's intent that an Act is civil can only be overcome by the clearest proof that the Act is punitive in purpose and effect. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The enactment of these laws is well supported by studies that demonstrate significant levels of recidivism among sex offenders and reveal the secrecy and trauma that envelops victims of sexual assaults.

As set forth below, the states have crafted registration and notification laws to address the many facets of recidivism among sex offenders. Some states have chosen to impose greater constraints on their own governments than those required by the federal Constitution. This choice does not

compel other states to limit the scope of their registration and notification laws. All the states' laws fall within the broad latitude that is afforded the states in acting for the public safety.

This brief provides an overview of the registration and notification laws of the fifty states. It then sets forth the research that supports the enactment of these laws. Finally, it applies the ex post facto analysis articulated by this Court in *Kennedy* to the registration and notification laws. As set forth below, these laws are not punitive in purpose or effect, and do not violate the constitutional prohibition against ex post facto laws.

A. Overview Of State Sex Offender Registration Laws

Although California enacted its sex offender registration law in 1947, retroactive to 1944 (Cal.Stats. 1947, ch. 1124, § 1), the vast majority of states enacted such laws within the last 15 years, many after 1994 in order to comply with federal law (the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071) which set out minimum standards for state compliance. Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) at p. 1 (hereinafter "CSOM, *Registration* "). (All CSOM publications cited herein are available at www.csom.org/pubs/sexreg.html.) Registration is intended to provide law enforcement with an investigative tool to identify possible suspects for unsolved sex offenses, and to enable law enforcement to locate such suspects.

State laws require sex offenders to register prior to or upon release from confinement, or when released on probation, and typically require that offenders be notified of the duty to register at sentencing or before release from confinement. CSOM, *Registration*, at 4. The information collected includes

the offender's name, address, fingerprints, and a law enforcement identification number, and 39 states also require a photograph as part of the registration process. CSOM, *Registration*, at 4. Some states also collect information on the registrant's physical description, date of birth, current employment, residence history, and vehicle registration numbers. Federal law also mandates that the states require sexually violent predators to provide "documentation of any treatment received for their mental abnormality or personality disorder." 42 U.S.C. 14071(b)(1)(B). However, this information is not made subject to public notification.

Most states require registrants to register for a minimum of 10 years, and in 1999 40 states required lifetime registration for specified sex offenders. Federal law now requires the states to mandate lifetime registration for sexually violent predators, aggravated and recidivist sex offenders. CSOM, *Registration*, at 5, *and see* 42 U.S.C. 14071(b)(6)(B)(i)-(ii). Some states allow designated offenders to petition for relief from the registration requirement after the 10-year period is completed. *See, e.g.*, Cal. Pen. Code, § 290.5; Or. Rev. Stat. § 181.600; 13 V.S.A. § 5411(c); Fla. Stat. § 775.21.

All the states require registrants to update their addresses at least annually, and federal law requires the states to mandate quarterly updates for sex offenders convicted of "aggravated" offenses. 42 U.S.C. 14071(b)(3)(B). Finally, most states (42) require the registration of some or all sex offenders convicted prior to the enactment of the state's registration law, but 17 apply the law retroactively only to those offenders who were incarcerated or under supervision at the time of the law's enactment. CSOM, *Registration* at 6-7. Some states' registries which predated the state's notification law contained significant numbers of registered sex offenders in the state, whose whereabouts were unknown to the public, and who would have remained unknown had the law been prospective only. For example, when its notification law was enacted in 1996, California had about 46,000 such offenders. 1998 Report

by California Department of Justice to the Legislature on California's Megan's Law, lodged herewith. Minnesota estimates it had 7,000 such offenders. State Survey by amici states of California and Colorado, lodged herewith [hereinafter "State Survey"].

Most states maintain a central sex offender registry. CSOM, *Registration* at 8. Local law enforcement or community supervision agencies receive the registration information from the registrant and forward it to the central registry. Bureau of Justice Statistics, *Summary of State Sex Offender Registry Dissemination Procedures* (1999) [available at www.ojp.usdoj.gov].

B. Overview Of State Sex Offender Notification Laws

Community notification laws vary more from state to state than sex offender registration laws. States vary in the procedures used for performing notification; the category of offenders subject to notification; the scope, form and content of notification; and the designation of agencies to perform notification. The state's sex offender notification laws can be divided into three categories: (1) broad community notification (19 states); (2) notification to those deemed at risk (14 states); and (3) passive notification, which requires citizens or community organizations to access sex offender information themselves (17 states). *Community Notification and Education,* April 2001, at 5 [hereinafter CSOM, *Notification*].

In states with broad community notification, law enforcement actively and widely releases information on designated sex offenders to the public. Some states define by statute the population subject to disclosure; others conduct risk assessments or rely on law enforcement agencies' discretion. In states notifying only those deemed "at risk," organizations typically notified are child care facilities, religious organizations, public and private schools, and other entities that

provide services to children or vulnerable populations. States allowing citizens access to sex offender information (passive notification) do so generally by making a central state registry public, although some require the citizen to be at risk from a specific offender in order to obtain access (defined by proximity to the offender's residence). CSOM, *Notification,* at 5.

Sex offenders are identified for notification in different ways. The majority of states specify by statute which sex offenders are subject to notification, and generally do not distinguish between high and low risk offenders. CSOM, *Notification,* at 6. This has also been referred to as the "compulsory" method of notification, utilized by 20 states without an individual determination of risk.[1] In a few states[2], law enforcement agencies determine when or who to notify about particular offenders. See, e.g., S.C. Code Ann. § 23-3-490; Or. Rev. Stat. § 181.592; Cal. Pen. Code § 290, subds. (m), (n). Finally, several states assess the individual risk posed by each sex offender: 12 states designate a state agency

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1. The 20 states utilizing this method are Alabama, Alaska, California, Connecticut, Delaware, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Virginia. *See* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure,* 3 Buff. Crim. L.R. 593 (2000) [hereinafter cited as "Logan"]; research current as of October 1999; but note that the Second Circuit held the Connecticut law violated due process in *Doe v. Dept. of Public Safety,* 271 F.3d 38 (2d Cir. 2001), cert. granted on 5/20/02 in case number 01-1231; *and see* State Survey, lodged herewith.

2. Arizona, Hawaii, Maine, Nebraska, North Dakota, Washington, and Wisconsin direct law enforcement agencies to make classification decisions which determine the extent/scope of notification. Logan, supra note 1, at 610, fn. 76.

to assess risk by using a written risk assessment instrument, and six states require that a committee assess the offender's risk of recidivism. CSOM, *Notification,* at 6.

Of the states opting for risk-based assessments on individual sex offenders, six do not classify all sex offenders, but designate only sexually violent predators, either by review board (Colorado, Idaho, Georgia, Louisiana, North Carolina, and West Virginia) or by court determination (Florida). Logan, *supra* note 1, at 606, nn. 53, 54. Seven states allow law enforcement to make individual risk assessments. *See supra* note 2. Twelve states require a risk assessment of all sex offenders be done by entities other than law enforcement. Arkansas, Iowa, Massachusetts, Minnesota, Nevada, Oregon, Rhode Island, Texas and the District of Columbia utilize either a parole board, state Department of Corrections or special board to assess offenders; New Jersey uses a prosecutor-based assessment; Wyoming requires a judicial assessment; and in Montana and New York, courts make classification decisions based on initial assessments by experts who utilize risk assessment criteria and guidelines. Logan, *supra* note 1, at 612-616; State Survey, *supra* note 1. At least ten of the states utilizing individualized risk assessment allow sex offenders to contest decisions subjecting them to notification. CSOM, *Notification,* at 10.

Most states use one or more of the following methods of notification: Internet access, media release, door-to-door flyers, or mailed flyers. Approximately 30 states and the District of Columbia now operate Internet websites listing registered sex offenders, and Rhode Island has also passed a bill authorizing such a website.[3/] California, Florida, New York, and Wisconsin

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3. States with websites are Alabama, Alaska, Arizona, Connecticut, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Jersey, New Mexico, Nebraska, New York, North Carolina, North Dakota, South

maintain "800" or "900" telephone lines that the public may call to inquire whether individuals are registered sex offenders. In California, a CD-ROM containing a list of registered sex offenders is available for public viewing throughout the state at local law enforcement offices. CSOM, *Notification,* at 7. Local law enforcement agencies in some states post lists of registered sex offenders in their jurisdictions on the Internet.[4/]

C. Research Supports The State Legislatures' Concerns About Sex Offender Recidivism

The *Otte* court held that Alaska's legislature did not intend its law to be punitive. Alaska recognized the problem of sex offender recidivism and addressed it by releasing information to the community. *Otte*, 259 F.3d at 986.

Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Rhode Island recently passed a bill authorizing an Internet site. CSOM, *Notification* at 8; Summary of State Sex Offender Registries, 2001, www.ojp.usdoj.gov; *and see* http://www.klaaskids.org (last visited March 18, 2002.) Note that offenders convicted prior to the effective date of Alaska's act were removed from the website by the Ninth Circuit in this case; Connecticut's site was stayed by the Second Circuit in *Dept. of Public Safety v. Doe,* note 1; and restrictions on the information which could be placed on New Jersey's site were announced in *A.A. v. New Jersey,* 176 F. Supp.2d 274 (D. N.J. 2001), rw. pending, U.S. Court of Appeals, 3d Cir., case numbers 01-4363 and 01-4471 [address information, including city of residence, excluded from Internet website.]

4. CSOM, *Notification,* at 8; local websites exist in Idaho, Massachusetts, Missouri, New Hampshire, Ohio, Oklahoma, Oregon, Washington, and Wisconsin. Klaaskids.org, *supra* note 3; State Survey, *supra* note 1.

Similarly, other states have chosen to address the problem through registration and notification laws.

Studies confirm the severity of the problem. Approximately 500,000 rapes and sexual assaults are reported each year. However, 80% of sexual assaults go unreported. Perkins, *Criminal Victimization in the United States*, 1993, National Crime Victimization Survey Report (Bureau of Justice Statistics, U.S. Dep't of Justice[5] 1 1996); Bachman, *Violence Against Women: Estimates from the Redesigned Survey*, National Crime Victimization Survey (B.J.S., U.S.D.O.J., Aug. 1995); English, *The Containment Approach: An Aggressive Strategy for the Community Management of Adult Sex Offenders*, 4 Psychol. Pub. Pol'y & L. 218 n.1 (1998).

Sex offenders pose a substantial risk of reoffending. Rapists have a recidivism rate of 49.4% to 63.8%; child molesters have a recidivism rate of 42% to 72%.[6] 2 Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 San Diego Law Review, 1057, 1072 n. 80 (2000); Prentky, *Recidivism Rates Among Child Molestors and Rapists: A Methodological Analysis*, 21 Law and Human Behavior 635 (1997); R. Karl Hanson, et al., *Long-Term Recidivism of Child Molesters*, 61 Consulting and Clinical Psychol. 646, 648 (1993); *Recidivism of Sex Offenders*, Center for Sex Offender Management (May 2001). Convicted sex offenders are 10.5 times more likely to be arrested for a rape

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5. Hereinafter, the "Bureau of Justice Statistics, U.S. Department of Justice" shall be referred to as "B.J.S., U.S. D.O.J."

6. Discrepancies between the recidivism rates are generally attributable to the methodological variables employed by researchers. Prentky, at 636. However, when the variables are reconciled, the statistics strongly support the conclusion that the rate of recidivism is higher than previous estimates. Comparet-Cassani at 1069-70.

than non-rapist offenders. Beck, *Recidivism of Prisoners Released in 1983* (B.J.S., U.S. D.O.J. 1997). Rapists commit an average of 5.2 rapes that go undetected, and child molesters have an average of 4.7 unreported victims.[7] 3 Groth, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime and Delinquency 450 (1982).

The studies indicate that sex offenders pose a risk of reoffending throughout their lives. "Contrary to conventional wisdom, most reoffenses did not occur within the first several years." Prentky, at 652. The "decay process" for rapists and child molesters is relatively slow and steady; offenders reoffend as late as twenty-four years after release from incarceration. Comparet-Cassani, at 1072. In later years, the recidivism rate for child molesters actually increased. Prentky, at 651-653.

Most sexual assaults are committed by an offender who is known to the victim. A Justice Department study showed that only 18% of rapes and sexual assault and 9.9% of child molestations are committed by strangers. Greenfeld, *Child Victimizers: Violent Offenders and Their Victims* (B.J.S., U.S. D.O.J. March 1996). The majority of the sexual assaults are committed by friends or acquaintances (53%), someone with whom the victim was intimate (26%), or another relative (3%); child molestations are most often committed by an acquaintance (40.1%), parents (33.4%), other family members (12.5%), or a boyfriend or girlfriend (1%).

Contrary to popular perceptions, sex offenders do not necessarily commit only one type of offense. Offenders may "cross over" from one type of sexual offense to another. "[M]any rapists of adult women also rape children and . . . many exhibitionists are also voyeurs and, given the opportunity,

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7. The number of child molestation victims does not reflect the actual number of undetected assaults because "it is characteristic of child molesters to have repeated contact with the same victim over an extended period of time." Groth, at 453-454.

may progress to more aggressive behavior." English, at 223-224. For example of 561 male offenders studied, 51% assaulted multiple age groups, 20% assaulted both genders, and 23% of incest perpetrators also molested children outside the family. These 561 offenders victimized 195,407 individuals with crimes ranging from child rape to obscene phone calls. *Id.*

Sexual assault takes a heavy toll on its victims. The effects on victims are often brutal and long-lasting, and the period of recovery can be prolonged. English, at 221. Victims of childhood sexual assault often act out in school, disrupt classrooms, and may sexually involve other children in the school lavatory. These victims' lives are often encased in conspiracy and secrecy, and their families often suffer extreme emotional and financial burdens as a result of these assaults. Hindman, J. *Just Before Dawn* 4 (1989). "Thus, apart from the substantial personal trauma caused to the victims of such crimes, sexual crimes against children exact heavy social costs as well." *Doe v. Poritz,* 662 A.2d 367, 375 (N.J. 1995). "Considering the tremendous physical and psychological impact sex crimes have upon the victims as well as their harmful societal effects, concerns of recidivism certainly warrant legislatures' attention." *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000).

D. Sex Offender Registration And Notification Laws Are Not Punitive In Intent Or Effect Under The United States Constitution

This Court observed in *Lambert* v. *California*, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957), that sex offender registration has not traditionally or historically been regarded as punishment. It is safe to say that no state enacted its sex offender registration or notification law with the intent to impose additional punishment on the offender, as "punishment" was construed by this Court in *Collins v. Youngblood,* 497 U.S.

37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Many states explicitly stated in their statutes that the purpose of enacting the registration and notification laws was for public protection and to facilitate law enforcement investigation and apprehension of sex offenders. See, e.g., Ala. Code, § 15-20-20.1; Or. Rev. Stat. § 181.602; Calif. Pen. Code § 290. Other states did not include express intent language in their statutes, but the legislative histories of the bills leave no doubt as to the concerns about sex offender recidivism and public safety which prompted the legislation. See, e.g., *People v. Adams,* 581 N.E.2d 637 (Ill. App. 1991); *Dean v. State*, 60 S.W.3d 217 (Tx.App. 2001); *State v. Pickens*, 558 N.W.2d 396, 398 (Iowa 1997).

Whether a statute is civil or criminal is a question of statutory interpretation. *Allen v. Illinois*, 478 U.S. 364, 368, 92 L.Ed.2d 296, 106 S.Ct. 2988 (1986). Nevertheless, the differences that exist between the states' registration and notification laws are not significant for purposes of an ex post facto analysis, since even those laws which have certain punitive aspects serve important nonpunitive goals. *See Moore v. Avoyelles Corr. Ctr.*, 253 F.3d 870, 873 (5th Cir. 2001) [held, Louisiana's notification law does not violate the Ex Post Facto Clause].

This Court explained in *Collins* that the Ex Post Facto Clause does not prohibit retroactive application of every change which alters the situation of a party to his disadvantage. *Collins*, 497 U.S. at 50; *and see Calif. Dept. of Corrections v. Morales,* 514 U.S. 499, 131 L.Ed.2d 588, 115 S.Ct. 1597 (1995). The only relevant category in determining whether it is ex post facto to apply sex offender registration and notification laws to sex offenders convicted before the operative date of such laws is whether they "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull,* 3 U.S. 386, 390 (1798). "After *Collins,* the focus of the ex post facto inquiry is not whether a legislative change produces some ambiguous sort of 'disadvantage'...but on whether any such change alters the

definition of criminal conduct or increases the penalty by which the crime is punishable." *Morales,* 514 U.S. at 506. Since civil commitment of dangerous sex offenders has been held not to "affix culpability for prior criminal conduct" (*Kansas v. Hendricks,* 521 U.S. at 362), it is patent that regulatory statutes, intended to register sex offenders and notify the public about such offenders living freely in the community, do not increase the penalty for the underlying sex offense.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169, this Court looked beyond the intent of the challenged law to determine whether the statutory scheme was so punitive in either purpose or effect to transform what was clearly intended to be a civil remedy into a criminal penalty. Factors were whether: (1) the sanction involved an affirmative disability or restraint; (2) it had historically been regarded as a punishment; (3) it came into play only on a finding of scienter; (4) its operation promoted the traditional aims of punishment--retribution and deterrence; (5) the behavior to which it applied was already a crime; (6) an alternative purpose to which it may rationally be connected was assignable for it; (7) it appeared excessive in relation to the alternative purpose assigned. This Court later observed, however, that these factors are neither exhaustive nor dispositive (*United States v. Ward,* 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)), and in fact may be expected to conflict. *Hudson v. U.S.,* 522 U.S. 93, 101, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

The most important question under the intent-effects analysis is whether the law serves significant nonpunitive goals. *United States v. Ursery,* 518 U.S. 267, 290, 116 S.Ct. 1235, 135 L.Ed.2d 549 (1996). Amici submit that more weight should be given to this factor than any other. In fact, "the clearest proof is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose and effect." *Kennedy,* 372 U.S. at 169; *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960).

In *Hudson,* this Court criticized its earlier opinion in

United States v. *Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), because it bypassed the question of whether a subsequently imposed penalty was criminal, and elevated one factor of *Kennedy,* i.e., whether the sanction was so grossly disproportionate to the harm caused as to constitute "punishment," to dispositive status. *Hudson,* 522 U.S. at 101. This Court also assigned error in *Halper's* assessment of the "character of the actual sanction imposed," 490 U.S. at 447, finding the Court should have evaluated the statute on its face to determine whether it provided for what amounted to a criminal sanction.

No state sex offender registration or notification law is intended to additionally punish the sex offender for the underlying crime, nor do such laws create criminal sanctions on their face. The effects of such laws, which Respondents contend render them punitive, cannot overcome the important nonpunitive purposes for which they were enacted. The Ninth Circuit erred by placing disproportionate weight on the same factor that this Court criticized in its earlier opinion in *Halper* for elevating to dispositive status.

1. Registration And Notification Do Not Create An Affirmative Disability Or Restraint

Sex offender registration/notification laws do not create an affirmative disability or restraint even if they make it difficult for individual registrants to obtain housing or employment, or subject some offenders to embarrassment or even vigilante action. Such statutes are regulatory, having no retributive purpose, but rather the legitimate nonpunitive purpose of ascertaining the whereabouts of those convicted of enumerated offenses.

This Court held that debarment from the banking profession did not render a civil sanction punitive or constitute an affirmative disability or restraint in *Hudson*, 522 U.S. at 102,

because it was "certainly nothing approaching the 'infamous punishment' of imprisonment." If debarment from an entire profession did not render a sanction punitive, then unauthorized discrimination in employment or housing by private persons against registrants does not create an affirmative disability or restraint. The means of accomplishing the regulatory purpose are not excessive.

The universal requirement of annual verification of addresses, and quarterly verification for those convicted of aggravated sex offenses, is not overly burdensome and is directly related to the public safety purpose of the law. Requiring quarterly registration for certain offenders and long-term, even lifetime, registration is also supported by research on recidivism. Research indicates that immediately prior to committing an offense, recidivists' compliance with treatment and other requirements deteriorates. They tend to miss more and more appointments. Hanson, *Dynamic Predictors of Sexual Recidivism* 1998-1, Solicitor General of Canada 22 (1998).[8/] Logically, the failure to comply with registration requirements may indicate that an offender's risk of reoffending has increased. Quarterly, as opposed to annual, registration provides law enforcement with immediate notice that an offender is not complying with registration. This permits law enforcement to locate the offender and assure such compliance.

Whether individual registrants may encounter difficulty in obtaining housing or employment, or even suffer illegal vigilante action (an uncommon event), is not relevant to an analysis of whether the law is punitive. In any event, vigilante actions have been infrequent. "The fact that violent incidents have been relatively rare may seem surprising given the media attention to these events." CSOM, *Notification,* at 13;

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8. This article may be found at www.sgc.gc.ca/epub/corr/e1998011b/199801b.htm.

and see E.B. v. Verniero, 119 F.3d 1077, 1089-1090, 1104 (3d Cir. 1997) [vigilante action "relatively rare"]. Just as actual conditions of confinement cannot divest a facially valid statute of its civil label *(Seling v. Young,* 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001)), the unintended effect on an individual of a facially civil law, validly enacted for a public welfare purpose, cannot render it punitive. In fact, for citizens who are not in the custody of the state, the right to personal security does not include the right to state protection from private violence. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

The *Otte* court found that the sex offender's duty to provide personal information, and the dissemination of address and employer information, contributed to creating an affirmative disability. The information required, however, is no more than necessary for effective public protection. The dissemination of address information is not the disclosure of intimately personal data which implicates the Constitution's right to privacy.[9/] If the

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9. While in many states rap sheets are not readily available, such rules merely reflects a policy judgment about the appropriate balance between the defendant's interest in getting a new start and the interest of others who might find criminal history information relevant to their decision making. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764-65, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989) (noting federal and state statutory and regulatory limitations on access to rap sheets). It does not reflect a general understanding that the dissemination of criminal history information by the government is additional punishment. The protection accorded by this Court to rap sheets in *Reporters Committee* reflected Congressional policy, not federal Constitutional law. The federal government and the states have today made different policy decisions when it comes to the criminal history of registered sex offenders, which they were entitled to make.

names of rape victims and juvenile offenders can be published, then a convicted sex offender should not be accorded a greater right to privacy. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ["ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions...."]; *Smith v. Daily Mail*, 443 U.S. 97, 61 L.Ed.2d 399, 99 S.Ct. 2667 (1979) [names of juvenile offenders not protected by Constitutional right to privacy from publication]. The right to privacy under the United States Constitution has been interpreted to apply to personal decisions involving marriage, procreation, contraception, family relationships, and child rearing and education. *Carey v. Population Services, Intern.*, 431 U.S. 678, 684-685, 52 L.Ed.2d 675, 97 S.Ct. 2010 (1977); *Planned Parenthood v. Casey,* 505 U.S. 833, 848, 120 L.Ed.2d 674, 112 S.Ct. 2791 (1992). ". . .Liberty implies the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interests of the community." 16A Am. Jur.2d, Constitutional Law § 563, at 584.

Today anyone can very likely locate, via the Internet, the address of any American they wish to find. For example, the address of any person owning real property in America can be obtained, even if his address is unlisted in the local telephone directory. Such websites as ussearch.com; google.com; anywho.com; dogpile.com; classmates.com; docusearch.com; and discreetresearch.com provide both free and paid information disclosing not just addresses and employment information, but a host of more potentially embarrassing information, such as paternity information, bankruptcies, divorces, lawsuits, and credit history.

It is crucial to ensuring public safety that sex offenders not remain anonymous. The general knowledge that registered sex offenders lived in their city would not have alerted the parents of Megan Kanka to the fact that a twice-convicted pedophile and two other convicted sex offenders resided just across the street. *See* CSOM,

Notification, at 3; *E.B. v. Verniero,* 119 F.3d at 1081. Neither could the general information available in California on registered sex offenders have alerted the parents of young Michael Lyons, killed after kidnap, sodomy and torture, that a convicted pedophile was employed at a business across the street from their home. *People v. Rhoades,* No. 98F00230 (Sacramento Sup. Ct.; automatic appeal pending).

Some sex offenders support community notification laws, stating that local knowledge of their past offenses helps in their effort to remain free of future offenses. *See* www.calsexoffenders.net, a website by a convicted California sex offender who states that while registration and notification laws "may be burdensome,. . . they help us remember who we've been so we don't become it again." The states have a compelling interest in providing the public with specific information on the whereabouts of registered sex offenders.

Court decisions can be found on the Internet, as can most major newspapers and other news publications. Internet research would probably reveal the names of most registered sex offenders today. While the Internet disseminates information worldwide, it is unlikely that persons living outside the area will have an interest in checking on the location of registered sex offenders in a certain jurisdiction. For those who need to know, the Internet is by far the most effective means of obtaining such knowledge. Before being shut down by the federal district court, the Connecticut website listing registered sex offenders received over three million "hits" in four and a half months. *Doe v. Dept. of Public Safety,* 271 F.3d at 44, n. 14. Efficiency in the delivery of information important to public safety should not be the excuse for its suppression. Additionally, websites can be updated immediately, so changes in registrants' status and whereabouts can be made in real time, helping ensure the accuracy of the sex offender registries. Since there is no right to privacy with respect to one's criminal record, the ease of public access to that record should not be construed to create an affirmative disability or restraint. *See Whalen v.*

Roe, 429 U.S. 589, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977); *Paul v. Davis*, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976).

The Ninth Circuit also found that extending the registration period for failure to register created an affirmative disability. While a few states extend the registration period when the offender is subsequently convicted for failure to register (see, e.g., 730 ILCS 150/10; Minn. Stat. § 243.166, subd. 6), the states can legitimately base the extension on the conclusion that an offender who wishes to hide his status and whereabouts is at a greater risk to reoffend than other offenders who have consistently complied with the registration law, and that a longer period of public disclosure is appropriate. Those states which do not permit judicial determinations of rehabilitation to relieve registrants of the registration duty are likewise entitled to legislatively determine that such a law is necessary for public safety, in that judicial assessment of rehabilitation is particularly difficult as to sex offenders. Neither is the sometimes lifetime registration obligation indicative of punitive intent, because the length of registration is directly related to a public safety purpose, based on studies showing recidivism risk for sex offenders persists over many years.

Finally, the Ninth Circuit criticized the Alaska requirement of lifetime registration for those convicted of "aggravated" sex offenses, finding that the lack of an individual determination of the risk of reoffense as to each offender created an affirmative disability or restraint under *Kennedy*. However, the states are not constitutionally mandated to enact registration or notification laws requiring individual assessments of risk. States must legislate in many areas based on general information regarding societal risk, e.g., revocation of drivers' licenses after drunk driving convictions. As this Court noted in *Hendricks*, the indefinite duration of civil confinement of sexually violent predators was not indicative of punitive intent because the length of confinement was linked to the purpose of commitment, just as lifetime sex offender registration and

notification are linked to the purpose of the registration and notification laws.

Some states' registration and notification laws base the length of registration and type of notification on the nature of the underlying sex offense. Others require additional factors to increase the frequency of registration or the level of community notification. The *Otte* court held that the Alaska Act was punitive because, among other things, it provides no opportunity for a registrant to prove that he no longer poses a risk of reoffending. *Otte*, 259 F.3d at 993-994. However, the Alaska legislature's determination that prior convictions were a sufficient indicator of future risk is entitled to substantial deference.

In assessing whether prior convictions indicate a sufficient risk of future dangerousness, legislatures are afforded the widest latitude in drafting statutes. *Hendricks*, 521 U.S. at 360. The studies cited above demonstrate that convicted sex offenders pose a significant risk of reoffending. Moreover, it is a risk that may not materialize in a criminal act for more than twenty years after the offender was released from custody. While the risk posed by sex offenders might be further delineated through psychological evaluations and evidentiary hearings, a legislature may reasonably conclude that a conviction for a sex offense is a good indicator of dangerousness.

Given the supporting studies, a legislature's determination that a prior conviction would support registration is a decision well within its authority. "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones v. United States*, 463 U.S. 354, 364, 103 S.Ct. 3043, 3049, 77 L.Ed.2d 694 (1983); *Hendricks*, 521 U.S. at 358, 117 S.Ct. at 2080 ("[p]revious instances of violent behavior are an important indicator of future violent tendencies"), *quoting Heller v. Doe*, 509 U.S. 312, 323, 113 S.Ct. 2637, 2644, 125 L.Ed.2d 257 (1993). Imposing reasonable limitations on the conduct of

convicted felons based on their convictions is well within the legislature's prerogative, particularly where this determination is supported by significant statistical research. *De Veau v. Braisted*, 363 U.S. 144, 158-160, 80 S.Ct. 1146, 1153-54, 4 L.Ed.2d 1109 (1960).

The fact that some states choose to do individual risk assessments, or are compelled by state constitutional law to conduct such assessments, does not mean that the federal Constitution requires all the states to enact similar laws. In fact, "[o]ne of the most consistent predictors of recidivism has been a history of prior convictions for sexual offenses. . . ." R. Karl Hanson, et al., "Long-Term Recidivism of Child Molesters", 61 J. of Consulting and Clinical Psychology 646. Individual risk assessment may not necessarily be more predictive of the risk of recidivism, because the validity of risk assessment as to a particular individual may often be uncertain. *See* Randy K. Otto, On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretation of the "Dangerousness" Literature, 18 Law & Psychol. Rev. 43, 45, 62-63 (1994) (noting that researchers in the 1970s began compiling data showing that the presumption that professionals could predict individual violent behavior was incorrect, but also noting that recent data showed "some" predictive ability).

2. Sex Offender Registration And Notification Have Not Historically Been Considered Punitive

The second *Kennedy* factor does not support a finding that sex offender registration and notification statutes are punitive, since sex offender registration has never been historically regarded as punishment (*Lambert*, 355 U.S. at 229), and neither have statutes which disclose criminal conviction records to the public been regarded as punitive, since nondisclosure of one's criminal record is not one of those

personal rights which is "fundamental" or "implicit in the concept of ordered liberty." *Whalen v. Roe*, 429 U.S. 589; *Paul v. Davis*, 424 U.S. 693.

3. Scienter Is Not Implicated In Registration Or Notification Laws

The third *Kennedy* factor, scienter (372 U.S. at 168), is not implicated, because the states' registration and notification statutes are triggered simply by the offender's arrival and residence in a community. Although the Ninth Circuit found that scienter was requisite under the Alaska law because the law did not address registration by those found not guilty by reason of insanity, the fact that a particular legislature has chosen not to regulate all classes of offenders (such as the criminally insane) is irrelevant to the scienter issue. No particular intention on the part of the sex offender registrant is involved or relevant to registration, because registration and notification commence based solely on conviction for a designated sex offense. As noted by this Court in *Hudson*, no scienter was required by the sanction imposed on those who violated the banking statute because the sanction applied without regard to the violator's state of mind. An earlier Ninth Circuit panel noted that the crime of **failing** to register as a sex offender constitutes a separate offense, and the fact that a prior sex offense conviction is an element of the "failure to register" offense is of no consequence to the scienter determination. *Russell v. Gregoire*, 124 F.3d 1079, 1088-1089 (9th Cir. 1997).

4. Registration And Notification Are Not Retributive, Although They May Prevent Future Sex Crimes

The fourth *Kennedy* factor is whether the statute

promotes the traditional aims of punishment, retribution and deterrence. Sex offender registration and notification laws do not inflict retribution because they neither label the offender as more culpable than before (though his culpability may be more widely publicized), nor do they turn on a finding of scienter. *Russell,* 124 F.3d at 1091. However, registration and notification may prevent future sex offenses. Studies at this point are not conclusive because the laws are so new, but preliminary research indicates that recidivism by Minnesota sex offenders released after notification began may be significantly reduced compared to recidivism by sex offenders released in 1992, prior to the enactment of Minnesota's notification law. State Survey, *supra* note 1. Even if such laws have a deterrent effect, it should not negate the overall remedial or regulatory nature of the statutes, since their objective is in fact to protect innocents and prevent future offenses, by allowing potential victims access to the truth. This Court has said that protecting the public and preventing crimes are the types of purposes it has found regulatory and not punitive. *DeVeau v. Braisted*, 363 U.S. at 160. *Ursery* declared that deterrence can serve both civil and criminal goals, and noted that the fact that a sanction may be tied to criminal activity alone is insufficient to render the sanction punitive. *Ursery*, 518 U.S. at 292; *see Hendricks*, 521 U.S. at 361-362.

The *Otte* court held that the Alaska statute was retributive because it tied the length of the reporting period to the "extent of the wrongdoing, not...[to] the extent of the risk posed." *Otte*, at 990. However, a legislature might reasonably determine that an offender who poses a risk of greater harm ought to register for a longer period that one who poses an equal risk of lesser harm.[10/]

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10. The example relied upon in *Otte* – comparing an offense involving a victim under thirteen years old (that requires longer registration) with an offense involving a victim between thirteen and fifteen years old (that requires shorter registration) – does not necessarily support a determination that the registration required turns on the level of wrongdoing. The distinction between the two offenses may be that the first one is deemed to involve a child molester. The risk of sexual abuse of children under thirteen years of age is greater than the risk for children over thirteen. *See Greenfeld*, at 2. And child molesters pose a greater risk of reoffending than rapists. Prentky, at 651-653.

Additionally, as the Prentky and other studies show, long-term registration serves the remedial interest of public safety because sex offenders are at risk to reoffend for their entire lives. According to Prentky, the failure rate for child molesters actually increases more than ten years after the offender has been released from custody. Prentky, 651-653. The *Otte* court's conclusion that an offender's risk of reoffending may subside is not borne out by the research.[11/]

While prior convictions trigger the duty to register, this does not mean that registration is punishment for the conviction. It is the underlying sex offense, proved beyond a reasonable doubt in the criminal action, that supports imposing the duty to register. *Jones*, 463 U.S. at 364. Nevertheless, the *Otte* court found that simply because the Alaska statute required registration by convicted sex offenders, it applied to criminal behavior and concomitantly favored a finding that the statute was punitive. *Otte*, 259 F.3d at 991.

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11. In assessing the excessiveness prong of the *Kennedy* test, the *Otte* court has interjected a due process analysis into the ex post facto analysis. The court held that there must be a procedure available to determine the level of risk before an offender is subjected to the registration-notification requirements of the Alaska Act. The focus should be on the statutory "sanctions" in assessing excessiveness. Cf. *Femedeer:* Internet notification not excessive in light of interests at stake: prevention, avoidance, and investigation.

The *Otte* court distinguished the Alaska statute from a Utah statute reviewed in *Femedeer*, 227 F.3d 1244. The Utah statute required registration by those who were civilly committed and those who were convicted of a sex offense. The *Otte* court held that it was the inclusion of those subject to civil commitment that made the Utah law non-punitive under this prong of the *Kennedy* test, unlike the Alaska law. However, a state might well determine that its civil commitment laws adequately protect society from those who have been committed.

In assessing this prong of the *Kennedy* test, Alaska's declared purpose of providing public safety from sex offenders should be given deference. The decision of Alaska, and other states, to rely on the underlying criminal determination in determining who is subject to registration and/or notification does not conflict with the remedial purpose. In some circumstances, the reliance on a criminal conviction is an important element of distinguishing criminal from civil statutes. Here, prior criminal conduct is considered, "Not to punish past misdeeds, but primarily ... to predict future dangerousness." *Hendricks*, 521 U.S at 362, 117 S.Ct. at 2082.

5. An Alternative Purpose Exists For These Regulatory Laws, And The Laws Are Not Excessive With Respect To The Public Safety Purpose Assigned

The fifth and sixth factors considered in *Kennedy* are whether the behavior triggering the regulatory measures was criminal (yes), and whether an alternative purpose is assignable to the regulatory measures the states have undertaken (yes: public safety and facilitation of law enforcement investigation of sex crimes). The seventh factor, whether the regulatory measure appears excessive in relation to the alternative purpose assigned, was overly weighted by the Ninth Circuit in analyzing

the Alaska law. Other regulatory sanctions have had harsh effects similar to the community's possible response to notification about sex offenders, and have been upheld. *See De Veau*, 363 U.S. 144 (forbidding work as a union official); *Hawker v. New York*, 170U.S. 189, 42 L. Ed. 1002, 18 S. Ct. 573 (1898) (revocation of a medical license); *Mahler v. Eby*, 264 U.S. 32, 68 L. Ed. 549, 44 S. Ct. 283 (1924) (deportation); *Flemming*, 363 U.S. 603 (termination of Social Security benefits)). Moreover, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.'" *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 777, n. 14, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

The state legislatures legitimately enacted sex offender registration and notification laws based on two premises: (1) that the long-term effects on victims who are sexually assaulted have become a serious societal problem, and (2) that sex offender recidivism is a significant concern. The registration of sex offenders, and notice to the public of their status and whereabouts, directly serves the state goals of reducing sexual assault by facilitating investigations of sex crimes and preventing recidivism.

The following examples of the effectiveness of notification law were taken from the California Department of Justice's Reports to the California Legislature[12/] on California's Megan's Law: (1) A woman viewing the state's sex offender registry on a CD-ROM at a law enforcement agency recognized a high-risk offender as a man who had been involved with a local Little League for years. She knew he did not live in the zip code area listed as his residence area. She notified local law enforcement, and investigation revealed he was in violation of the registration law and had molested at least eight boys. 1998 Report. (2) A CD-ROM viewer recognized a serious sex

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12. Mandated by Cal.Pen. Code § 290.4, subd. (m), the reports are lodged with this Court.

offender with prior child molestation convictions as a bus driver who transported disabled children. After investigation, the driver was charged with molesting two disabled children. 1998 Report. (3) A CD-ROM viewer recognized a neighbor, a serious sex offender, who had befriended her son. After investigation, the offender was subsequently arrested for molesting the viewer's son. (4) Police distributed a flyer identifying a person as a high-risk sex offender. When the offender attempted to lure a 14-year-old girl into his car, asking her for directions, she recognized him from the flyer and refused the ride. The offender was arrested for violating parole by having contact with a minor. 1998 Report. (5) Viewing the CD-ROM, a mother recognized her live-in boyfriend, who was listed as a registered child molester. She asked him to move out to protect her children. 2000 Report. (6) Viewing the CD-ROM, a day care operator saw that a neighbor of the day care center was a high-risk sex offender, and notified her employees. An employee later saw the offender expose himself near the center. Surveillance by law enforcement resulted in the offender's arrest for indecent exposure and sex offenses in two other counties. 2001 Report. (7) After local law enforcement distributed a flyer on a serious offender, neighbors recognized the offender, who had befriended local children, and discovered he had been taking them to a nearby wood for sex. He was convicted of sexually abusing three children. 2001 Report.

An example of the registration law fulfilling its purpose was the case of *People v. Guadalupe DeLeon* (No. F017947, Cal. App. 1993), in which a registered sex offender with a prior rape conviction committed a series of increasingly violent sexual assaults upon women asleep in their homes at night. In the final assault, the defendant knocked out the victim's teeth, cutting his hand and leaving his own blood at the scene. His rare blood type matched the blood type of one registered sex offender in the county, and subsequent investigation proved he was the serial rapist.

American society is no longer the village model in

which all those in the district are aware of the history of every individual member of the local population. In our largely urban, mobile world, it was easy for sex offenders to remain anonymous before the enactment of sex offender notification laws. While some argue anonymity is their right, hiding the past may facilitate and even enable offenders to perpetrate new sex offenses. This Court should give significant weight to the fact that the registration and notification laws were enacted to serve important nonpunitive goals, based on appropriate decisions by state legislatures balancing the interests of individual sex offenders with societal risks. Amici submit that Respondents have not demonstrated by the clearest proof that either of Alaska's registration or notification laws is punitive in purpose or effect.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the decision of the Ninth Circuit Court of Appeals be reversed.

Dated: May 22, 2002

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IN THE SUPREME COURT OF THE UNITED STATES

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners

V.

JOHN DOE I, ET AL.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

QUESTION PRESENTED

Does the Alaska Sex Offender Registration Act violate the prohibition against *ex post facto* laws set forth in Article I, §10 of the United States Constitution?

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INTEREST OF THE MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES.[1]

The Massachusetts Committee for Public Counsel Services (CPCS) is the Massachusetts agency charged with representing indigent parties in a variety of criminal and civil matters. CPCS is statutorily mandated to provide counsel to indigent former sex offenders who are subject to the registration and notification provisions of the Massachusetts Sex Offender Registration and Notification Act. Mass.G.L. c.6, §178C-P (2002 edition). The instant case, which raises a question concerning the constitutionality of the Alaska sex offender registration and notification act, is likely to have important ramifications for the rights and interests of Massachusetts former sex offenders subject to the Massachusetts act.

CPCS also represents indigent defendants charged with sex offenses. Sex offender registration and notification has dramatically changed the consequences of a conviction for a sex offense. This Court's opinion in the instant case is likely to have considerable impact upon the future handling and disposition of sex offense charges.

CPCS submits this *amicus* brief to challenge the validity of certain empirical claims by petitioners and its *amici* United States and Attorneys General of Forty-One States, including

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the Massachusetts Committee for Public Counsel Services (CPCS) states that no part of this brief was written by counsel for any party. No person, agency, or organization other than CPCS has made a monetary contribution to the preparation and filing of this brief. All parties have consented to the appearance of CPCS as *amicus curiae* in this matter. Letters of consent have been filed with the Clerk.

claims regarding the rate of recidivism of sex offenders and the usefulness of public notification in preventing sex offender recidivism.

ARGUMENT

I. EMPIRICAL EVIDENCE DOES NOT SUPPORT THE CLAIM OF ALASKA AND ITS *AMICI CURIAE* THAT SEX OFFENDERS RELEASED FROM INCARCERATION ARE AT UNUSUALLY HIGH RISK OF COMMITTING A NEW SEX OFFENSE.

The Alaska sex offender registration act, 1994 Alaska Sess. Laws 41 (hereinafter "the act"), provides that every sex offender, regardless of whether he or she has been rehabilitated, must register with law enforcement authorities either for a period of fifteen years from the date of unconditional discharge or, in the case of two or more sex offenses, for his or her lifetime. Alaska Stat. §§12.63.020, 12.63.100. Doe v. Otte, 259 F.3d 979, 982-983 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 1062 (2002). The act applies retroactively to persons, such as John Doe I and John Doe II, convicted before its enactment. 1994 Alaska Sess. Laws 41, §12(a).

Regulations implementing the act require that registration information, which includes, *inter alia,* offenders' names, home and work addresses, photographs, and description of convictions, be made available on the internet at a state-maintained web site. Alaska Stat. §12.63.010(b)(1); Alaska Admin. Code tit.13, §09.050 (2000). As a consequence, not only persons in the Does' home towns may obtain access to their registry information, but also persons elsewhere in Alaska,

in New York, Paris, Tokyo or in any location where there is internet access.

The Court of Appeals held that the Alaska act, as applied to the Does, violates the *ex post facto* clause of the United States Constitution. Doe v. Otte, supra, 259 F.3d at 995. Reviewing the act through the lens of the seven factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court found that the act was excessive in relation to its purpose of protecting public safety. Doe v. Otte, supra, 259 F.3d at 991-993. Broad, world-wide dissemination of registry information for all offenders, including those who have been rehabilitated, the Court concluded, is "unquestionably punitive." Id. at 993.

Alaska and its *amici* Attorneys General[2] and Solicitor General respond that world-wide dissemination of registry information, even for rehabilitated offenders, is an appropriate response to what they characterize as the dramatically high rate at which convicted sex offenders commit new sex offenses. A closer inspection of the sources they cite for this proposition regarding sex offender recidivism, however, reveals that the "once a sex offender always a sex offender" mantra is in fact a myth.

A. Approximately 2.5% of rapists are rearrested for a new rape during the three years following their release from prison.

The Bureau of Justice Statistics of the United States Department of Justice (hereinafter "BJS") has issued two

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[2] *Amici curiae* Attorneys General of Forty-One States are referred to throughout this brief as "Attorneys General." *Amicus curiae* United States is referred to "Solicitor General."

reports within the last decade addressing recidivism by rapists. The most recent of these reports, issued in 2002, indicates that the rate of rearrest of rapists for a new rape in the three years following release from prison is 2.5%.

(i) 1997 Bureau of Justice Statistics Report

In 1997, the BJS issued a report on rape and sexual assault, which included a review of recidivism statistics for persons convicted of rape.[3] BJS, Sex Offenses and Offenders (February 1997) (hereinafter "Sex Offenses" or "1997 BJS study").[4] The study followed 2,214 convicted rapists from 11 States for a period of **3 years** after their release from prison in 1983, during which time they were on probation. Sex Offenses 25-26. The BJS recorded the following results with regard to rearrest (not reconviction) of these offenders:

1. 51.5% were rearrested and charged with a new crime

2. 27.5% were rearrested and charged with a new violent crime

3. **7.7% were rearrested and charged with rape**

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[3] "Rape" and "sexual assault" are broadly defined, and include most offenses requiring registration under the Alaska statute. See BJS, Sex Offenses and Offenders (Sex Offenses) 1 n.1 (1997). The report included statistics for recidivism by rapists, but no statistics for recidivism by persons convicted of sexual assault.

[4] All BJS studies may be found at http://www.ojp.usdoj.gov/bjs.

4. 10.7% were rearrested and charged with nonsexual assault

5. 8.5% were rearrested and charged with robbery

6. 2.8% were rearrested and charged with murder

Sex Offenses 26, figure 27.

Fewer than 1 of 10 rapists was rearrested and charged with a new rape.

The rate of rearrest of rapists for a new felony is low, relative to the rearrest rate of other violent offenders. The 1997 BJS study reported that:

> ...rapists had a lower rate of re-arrest for a new felony and a lower rate of re-arrest for a violent felony than most categories of probationers with convictions for violence. While about 41% of violent probationers were re-arrested within 3 years of placement on probation for a new felony offense, an estimated 19.5% of rapists were re-arrested for a new felony within 3 years.

Sex Offenses 25-26.

Rapists were rearrested and charged with a new felony less than half as frequently as other violent offenders.

(ii) 2002 Bureau of Justice Statistics Report

A larger, and much more current,[5] study was conducted by the BJS in 2002. BJS, Recidivism of Prisoners Released in 1994 (June 2002) (hereinafter "Recidivism" or "2002 BJS study"). This study tracked recidivism rates for 272,111 former inmates for a period of 3 years following their release from prison in 1994. The persons included in the pool represented two-thirds of all persons released from prison in 15 States, and included 3,138 rapists. Recidivism 1, 8-9.

The 2002 BJS study found that rapists were rearrested for a new rape at an even lower rate than was reported in the 1997 BJS study. During the **3 years** following release from prison in 1994:

1. 46% of rapists were rearrested and charged with a new offense

2. 18.6% were rearrested and charged with a new violent offense

3. **2.5% were rearrested and charged with rape**

4. 11.2% were rearrested and charged with a drug offense

5. 8.7% were rearrested and charged with a nonsexual assault

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[5] The 2002 study collected statistics on inmates released 11 years after the inmates for whom statistics were collected in the 1997 study.

6. 14.8% were rearrested and charged with a property offense

Recidivism 9, table 10.

See also ibid. ("of the 3,138 released rapists, 78 were arrested for rape and the remaining 3,060 were either rearrested for something else or not rearrested").[6]

The Solicitor General and the Attorneys General are incorrect in asserting in their *amicus* briefs that sex offenders "are the most likely to reoffend,"[7] "have a dramatically higher recidivism rate for their crimes than any other type of violent felon," and "have an abnormally high rate of recidivism." Brief of the Solicitor General (hereinafter Br.SG) 2. The claim that

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[6] The 2002 BJS study presents data on the rates of rearrest of violent felons, in addition to rapists. Recidivism 9, table 10. Unlike the 1997 BJS study, however, it does not include a direct comparison of the rearrest rate for violent felonies of rapists with the rearrest rate for violent felonies of other violent felons. The rate of rearrest of all violent felons (including rapists) for a new violent felony is reported as 27.5%, as compared to a rate of 18.6% for rapists. Recidivism 9, table 10.

[7] In its *amicus* brief, the Solicitor General claims that sex offenders are "'the least likely to be cured'; '[]the most likely to reoffend'; and '[]prey on the most innocent members of our society.'" Br.SG 2. These sweeping conclusions are quotes from a political speech delivered by Texas State Senator Florence Shapiro at a conference on sex offender registries. See BJS, National Conf. On Sex Offender Registries 93 (April 1998). State Senator Shapiro cites no sources in support of these claims.

"[r]apists have a recidivism rate of 49.4% to 63.8%,"[8] Brief of Attorneys General (hereinafter Br.AG) 10, is strikingly at odds with the statistics set forth in the 1997 and 2002 BJS reports.

(iii) The "Odds" that a Rapist Will Reoffend

Although *amici* Solicitor General and Attorneys General both cite to the 1997 and 2002 BJS reports on recidivism by sex offenders and by criminal offenders, neither acknowledges the very low rate of recidivism for rapists reported in those studies. Instead, they make much ado over the difference between the odds that a former sex offender will commit a new rape and the odds that a former felon, not convicted of rape, will be arrested for rape. Br.AG 10.

An individual rapist released from prison is more likely than an individual nonrapist released from prison to commit a rape during the three years following his release. According to the 2002 BJS report, a rapist's odds are 4.2 times a nonrapist's odds of being rearrested for rape. Recidivism 10. The 1997 BJS study reports that the odds differ by a factor of 10.5. Sex Offenses 27.

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[8] The *amicus* brief of the Attorneys General cites as authority for this statistic J. Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 San Diego Law Review 1057, 1072 n.80 (2000). The Comparet-Cassani article reports only general recidivism rates of sex offenders, i.e., rearrest rates of sex offenders for any new crime, and is not limited to rearrest rates for new sex offenses. The California study upon which Comparet-Cassani relies for her statistical claims in fact reports that over a 15 year follow-up period, "19.7% of [sex offenders] went on to recidivate with a subsequent sex registrable offense." R. Lewis, Effectiveness of Statutory Requirements for the Registration of Sex Offenders 7 (1988). This California study is discussed *infra* at 14-15.

This, however, does not mean that former rapists are highly likely to commit new rapes. Fewer than 3 of 100 former rapists were rearrested for rape in the three years following release from prison. Recidivism 9, table 10. The 2002 BJS study indicates that a smaller percentage of nonrapists than of rapists were rearrested and charged with rape during the three year period. It also indicates, however, that the absolute number of nonrapists arrested for rape was substantially larger than the absolute number of rapists rearrested for rape. Recidivism 9, table 10.

1. rapists arrested and charged with rape: 2.5% (number - 78)

2. drug offenders arrested and charged with rape: .3% (number - 266)

3. burglars arrested for rape: .8% (number - 330)

4. offenders against public order arrested for rape: .4% (number - 104).

Ibid.[9]

Of the 778 felons arrested for rape after release from incarceration, only 78 had a prior rape conviction.

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[9] These numbers were derived by multiplying the rate of arrests for rapes by the number of inmates released for each category of prior offense. For example, 41,257 burglars (Recidivism 9, table 10) were released from prison at the outset of the study period. The percentage arrested for rape during the following three years was .8%. Ibid. When multiplied, these two numbers indicate that 330 former burglars were arrested for rape during the three year period.

B. Most offenders against children are family members rather than prior offenders committing new crimes.

Many victims of rape and sexual assault are persons under 18 years of age. Sex Offenses iii ("44% of rape victims were under the age of 18"). Their stories of abuse are often horrific. Worldwide dissemination of the registry information of former sex offenders cannot, however, reasonably be judged an effective deterrent to future sex crimes against children.

In 2000, the BJS collected and analyzed data concerning the sexual assault of persons under 18 years of age (hereinafter "children"). BJS, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident and Offender Characteristics (July, 2000) (hereinafter Sexual Assault of Young Children or "2000 BJS study"). The study reviewed the case files of 118,753 children who were victims of rape or sexual assault between 1991 and 1996.[10] Id. 1. Data was gathered from 12 states. Ibid. The following statistics were reported:

1. for victims under the age of 6, 49% of the perpetrators were family members

2. for victims between the ages of 6 and 11, 42% of the perpetrators were family members

3. for victims under the age of 6, 3% of the perpetrators were strangers

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[10] "Rape" and "sexual assault" are broadly defined, but exclude statutory rape. Sexual Assault of Young Children 13.

4. for victims between the ages of 6 and 11, 5% of the perpetrators were strangers

Sexual Assault of Young Children 10.

The 1997 BJS study likewise reported that in 90% of the rapes of children younger than 12, the child knew the offender. Sex Offenses iii. In 43% of these cases, the offender was a family member. Id. 11.

No recidivism statistics were available for the BJS studies, and none were included in any of the three reports. The absence of statistics on rearrest of persons convicted of sex offenses against children is a major impediment to determining their rate of recidivism.

The Solicitor General claims that those who commit sex offenses against children present an even higher risk of recidivism than sex offenders generally. Br.SG 4. The authorities cited do not support this proposition. BJS, Child Victimizers: Violent Offenders and Their Victims 9-10 (1996) (hereinafter Child Victimizers), for example, does not report recidivism statistics for child molesters, but rather addresses characteristics of violent offenders against children generally. It notes that "[o]ffenders with multiple child-victims were most likely to be serving time for robbery, aggravated assault, negligent manslaughter, or murder." Id. 9.

R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. of Consulting and Clinical Psychology 646 (1993), cited at Br.SG 4, n.3, studied a group of 197 Canadian child molesters released between 1958 and 1974. Id. 648. Hanson did not report statistics on the recidivism rate of child

molesters for new instances of child molestation, but only for violent offenses. Id. at 648. Even so, Hanson found that:

> 1. the rate of reconviction of child molesters for a new sexual or violent offense during the **first five years** of the study was **5.2%**
>
> 2. the rate of reconviction of child molesters for a new sexual or violent offense during **each following year** was approximatly **1.8% per year**

Id. at 648.

This means that **ten years** after release, approximately **12.9% of child molesters were convicted for either a new sexual or violent offense.**

Statistics aside, it is highly unlikely that internet disclosure of registry information will be of particular use in protecting many of these children, given the large percentage of offenders who are family members. Consulting a registry of convicted offenders will at best provide a false sense of security based on an uninformed assumption that the most likely child molesters have been included on the list.

C. Information on longer term recidivism rates is extremely limited.

Amicus Solicitor General urges that long term recidivism rates must be considered when assessing recidivism by sex offenders because sex offenders continue to reoffend

many years after release from prison. Br. SG4 n.3. This is easier said than done.

The BJS appears to have published no long-term study of recidivism by sex offenders. Two states have completed studies that track sex offense recidivism rates in their jurisdictions for more than three years after release from prison. These studies, although limited by the small number of subjects studied, are nevertheless of some interest. In addition, two Canadian researchers have published a meta-analysis[11] which, although not a long term study, is worthy of notice because of the very large number of offenders included.

(i) New Jersey

In 2002, the New Jersey Department of Corrections issued a study, which tracked 79 offenders released from the Adult Diagnostic and Treatment Center in 1990. N.J. Dept. of Correction, Report - 1990 Recidivism Study[12] (January 21, 2002)(hereinafter "New Jersey Study"). All had been found to be repetitive and compulsive sex offenders. The offenders were tracked for a period of **ten years**. The following results were reported.

> 1. 26.5% were reconvicted for nonsexual offenses

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[11] A meta-analysis is a study which collects and analyzes statistics reported in other studies.

[12] This study in included in materials lodged by the New Jersey Public Defender et al. along with its *amicus* brief in support of respondents.

2. **3.8% were reconvicted for sexual offenses**

New Jersey Study 3.

One of the three reconvictions for a sexual offense occurred during the first five years after release, and two more during the second five year period. Id. 5.

(ii) California

In 1988, the California Department of Justice issued a report on the effectiveness of its sex offender registration statute. The report included recidivism statistics for a group of 1,362 sex offenders released in 1973 and tracked for a period of **15 years**. Lewis, R., Effectiveness of Statutory Requirements for the Registration of Sex Offenders (1988) (hereinafter "California Study")[13] 1, 7. The following results were reported.

1. **19.7% of sex offenders were arrested for a new sex offense[14]**

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[13] This study may be found on the internet at http://caag.state.ca.us/cjsc.

[14] The higher rates found in California as compared to New Jersey may reflect not only the five-year difference in the follow-up period, but may also reflect the fact that the New Jersey offenders received sex offender treatment while incarcerated. See McKune v. Lile, 2002 U.S. LEXIS 4206, *19 (2002) ("[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism"). It is also significant that the California study reports rates of rearrest as opposed to reconviction, and that the California study was conducted twelve years before the New Jersey study.

2. although the percent of nonsexual offenders arrested for a sex offense was lower than 19.7%, the actual number of violent offenders, of property offenders and of each other category of nonsexual offenders (excluding drug offenders) arrested for a sex offense was significantly higher than the actual number of sex offenders arrested for a sex offense[15]

California Study 8, table 2.

(iii) Hanson and Bussiere Meta-Analysis

In 1998, two Canadian researchers published a meta-analysis of numerous previously published studies, addressing the recidivism rates of sex offenders. R.K. Hanson and M. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 Journal of Consulting and Clinical Psychology 348 (1998) [hereinafter "the meta-analysis"]. Hanson and Bussiere gathered information from 61 studies of sex offender recidivism, which cumulatively reported recidivism statistics for **28,972** sex offenders. Id. at 349-351.

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[15] The actual number of offenders is derived by multiplying the rate of arrests for sex offenses by the number of persons released for each category of offense. For example, former property offenders were arrested for a sex offense at the rate of arrest 2.7%. California Study 8, table 2. The number of property offenders released in 1973 was 22,417. Ibid. When multiplied, these two numbers indicate that 605 property offenders were arrested for sex crimes during the 15 year study.

The studies surveyed were conducted in six North American and European countries, as well as Australia. Thirty studies were of American sex offenders. Ibid. Adult and adolescent offenders, and offenders against children and adults, were included. Ibid. Recidivism was measured by reconvictions, arrests, self-reports and parole violations for a new sex offense. Ibid.

The meta-analysis found that the recidivism rate of sex offenders for new sex offenses in the **4 to 5** years following release from incarceration was **13.4%**. Although the follow-up period was not lengthy, the meta-analysis is of particular interest because of the large number of sex offenders it encompassed.

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Many researchers on sex offender recidivism have noted substantial inconsistencies among studies, both as to rates of recidivism and as to factors that predict recidivism. Center for Sex Offender Management,[16] Recidivism of Sex Offenders 7 (May 2001). B. Schwartz and H. Cellini, *Sex Offender Recidivism and Risk Factors in the Involuntary Commitment Process*, in Schwartz, ed., The Sex Offender: Theoretical Advances, Treating Special Populations and Legal Developments III 8-4 (1999). Some of the variation has been attributed to differences in the quality of the studies. Schwartz and Cellini 8-4 (recidivism studies differ widely in the quality of the research design, including criteria for success or failure, presence of control group, length of follow-up time, and correctness of statistics used in analyzing time at risk).

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[16] Publications of the Center for Sex Offender Management may be found at www.csom.org.

A second important factor, however, is the pool of offenders studied.

> One possible reason for the amount of disagreement in these studies is that they may use a heterogeneous group of sex offenders in their analysis. Mixing an antisocial rapist with a socially skilled fixated pedophile with a developmentally disabled exhibitionist may indeed produce a hodgepodge of results.

Schwartz and Cellini 8-6.

Alaska has made no attempt to distinguish subgroups of sex offenders or individual sex offenders who may be at much lower risk of reoffending from other subgroups or individuals who pose a higher risk. It has instead opted for the "hodgepodge" approach, with the result that even incontrovertibly rehabilitated former offenders are subject to its harsh provisions.

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The Alaska sex offender registration act is grounded on the legislative finding that "sex offenders pose a high risk of reoffending after release from custody." 1994 Alaska Sess. Laws c.41, §1. This finding is not supported by empirical evidence. The fact that the legislature has declared it to be so does not transform its "finding" into fact. "Where government must show an interest of more than the usual degree of urgency to justify imposition on the individual, the simple invocation of its legislative judgment, buttressed perhaps by a showing of a rational basis for that judgment, will not do." Doe v. Attorney General, 426 Mass. 136, 150 (1997) (Fried, J., concurring) (holding that Massachusetts sex offenders have state

constitutionally protected liberty and privacy rights in avoiding registration and dissemination and are entitled to due process prior to encumbering those rights). Because of the importance of the interests of sex offenders in avoiding the highly damaging consequences of public dissemination of registry information, actual empirical evidence that sex offenders pose a high[17] risk of reoffending by committing a new sex offense is required.

II. EMPIRICAL EVIDENCE SUGGESTS THAT DISSEMINATION OF SEX OFFENDER REGISTRY INFORMATION MAY UNDERMINE PUBLIC SAFETY.

The Alaska sex offender registration and notification act was also premised on a finding that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." 1994 Alaska Sess. Laws 41, §1. It is far from obvious that this premise is valid. In fact, available evidence, while limited, suggests that dissemination has the opposite effect.

Without evidence that the act serves a legitimate public safety purpose, and without evidence that it is not excessive in relation to the need to protect public safety, the legislature's declaration that the act is regulatory and not punitive is suspect. Doe v. Otte, supra, 259 F.3d at 991, citing Mendoza-Martinez, supra, 372 U.S. at 169.

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[17] The Alaska act does not define what is meant by a "high" risk of reoffending.

(i) Iowa Study

In December, 2000, Iowa published a report comparing the recidivism rates of sex offenders subject to the notification law to the recidivism rates of sex offenders convicted of comparable sex crimes, but not subject to the notification law because their release date was prior to the effective date of the statute. G. Adkins, D. Huff, & P. Stageberg, The Iowa Sex Offender Registry and Recidivism (December 2000) (hereinafter Iowa Study).[18]

The notification group consisted of 233 sex offenders released from prison and placed on the registry during 1995-96. Iowa Study 2. The group not subject to notification consisted of 201 sex offenders released from prison or discharged from probation during 1995-96, who would have been required to register if the registry law had been in effect at the time of their offenses. The study followed these offenders for **4.3 years**.

During the 4.3 year follow-up period:

1. **3%** of the notification offenders were reconvicted of sex offenses

2. **3.5%** of the group not subject to notification were reconvicted of sex offenses

Iowa Study 10.

This difference in reconviction rates is not statistically significant. Iowa Study 19. Notification appears to have had no effect on recidivism by sex offenders.

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[18] This study is available on the internet at http://www.state.ia.us/government/dhr/cjjp/pdfs/SexOffenderReeport.pdf.

(ii) Washington Study

In 1995, a study was published assessing the effect of public notification of sex offender registration on sex offender recidivism in the state of Washington. D. Schram & C. Milloy, Community Notification: A Study of Offender Characteristics and Recidivism (October 1995) (hereinafter Washington Study).[19] The recidivism rate of 90 adult offenders subject to the highest level of notification was compared with the recidivism rate of 90 offenders released prior to the effective date of the law.

After **4.5 years,**

1. **19%** of the group subject to notification were rearrested for a sex offense

2. **22%** of the group not subject to notification were rearrested for a sex offense

Washington Study 3. This difference is not statistically significant. Ibid. "[T]he findings suggest that community notification had little effect on recidivism as measured by new arrests for sex offenses or other types of criminal behavior." Ibid.

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[19] This study may be found on the internet at http://www.wsipp.wa.gov/crime/pdf/chrrec.pdf.

(iii) California Study

In 1988, California published a study which, in addition to providing recidivism statistics for sex offenders, surveyed criminal justice agencies, including law enforcement, probation, parole and the district attorneys offices, concerning their views of the effectiveness of offender registration in preventing sex offender recidivism. R. Lewis, Effectiveness of Statutory Requirements for the Registration of Sex Offenders 9-10 (1988) (hereinafter California Study).[20] Researchers found that "approximately half of the respondents do not believe that the sex registration system is effective in preventing sex offenders from committing sex offenses or other crimes." (emphasis in original) California Study 10.

(iv) U.S. Department of Justice Study of Notification in Wisconsin

In December, 2000, the National Institute of Justice, an agency of the U.S. Department of Justice, issued a study of the impact of the sex offender notification law in Wisconsin. See R. Zevitz and M. Farkas, Sex Offender Community Notification: Assessing the Impact in Wisconsin (December, 2000) (hereinafter Wisconsin Study).[21] The study solicited information from many sources concerning the effectiveness of the act, including the impressions of sex offenders to whom it is applicable. Personal interviews were conducted with thirty "high risk" sex offenders.

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[20] The internet site at which this study may be found as set forth in footnote 8.

[21] This study may be found on the internet at http://www.ncjrs.org.

> All but one interviewee stated that the community notification process adversely affected their transition from prison to the outside world. Loss of employment, exclusion from residence, and the breakup of personal relationships were frequently cited consequences of expanded notification actions and ensuing detrimental publicity []. Seventy-seven percent told of being humiliated in their daily lives, ostracized by neighbors and lifetime acquaintances, and harassed or threatened by nearby residents or strangers. Although only one interviewee was on the receiving end of what might be described as vigilante action, all expressed various degrees of concern for their own safety.

Wisconsin Study 9.

The study notes that most of the thirty offenders believed that the law would not prevent sex offense recidivism, but "would have the opposite effect." Wisconsin Study at 10. "Many drew from their own embittered experience with community notification to suggest that the tremendous pressure placed on sex offenders by the public and the media would drive many of them back to prison." Ibid. See also id. 11 ("The pressure placed on many of these individuals by community notification needs to be further examined as a factor in their success or failure under community supervision").

The negative repercussions for public safety of the daily humiliation, ostracizing by friends and neighbors, and difficulty in finding housing and employment predicted by sex offenders in the Wisconsin study should not be ignored. A 1998 study of dynamic factors affecting sex offender recidivism found that

sex offenders are at the highest risk of reoffending when they "show sharp increases in dysphoric moods, particularly anger." R.K. Hanson and A. Harris, Dynamic Predictors of Sexual Recidivism 1 (1998). Inflicting a high level of stress on a daily basis through the operation of a public notification law is not a sensible approach to reducing recidivism by sex offenders.

The declaration by the Alaska Legislature that its sex offender notification act protects the public safety does not make it so. A successful approach to sex assault prevention must be guided by fact and not by fantasy.[22] Public notification is not part of the solution to sex offender recidivism.

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22 Even the most avid proponents of measures to reduce the incidence of sexual assault have called for the repeal of sex offender notification laws, on the ground that they ultimately undermine rather than serve the public safety concerns that motivated them. C. Wells and E. Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. Law Rev. 127, 130-135, 192-194 (2001).

CONCLUSION

For the reasons stated above, and for the reasons set forth in the brief of petitioners John Doe I, Jane Doe and John Doe II, and in the briefs of their *amici curiae*, this Court should affirm the ruling of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 01-729 (18)

IN THE SUPREME COURT OF THE UNITED STATES

GLENN G. GODFREY AND BRUCE M. BOTELHO, PETITIONERS

v.

JOHN DOE I, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION BY AMICUS CURIAE, THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY, FOR LEAVE TO LODGE DOCUMENTS UNDER SEAL

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The Public Defender of the State of New Jersey ("the Public Defender") hereby motions the Court for leave to lodge documents under seal as amicus curiae in Godfrey, et al. v. Doe, et al., No. 01-729, (cert. granted Otte, et al. v. Doe, et al., Feb. 19, 2002, reported at 122 U.S. 1062).

The documents at issue comprise fifty-eight certifications, affidavits, and declarations ("the declarations") dating from 1995 to 2002, submitted by persons convicted of a sex offense, or in several instances, their family member or legal counsel. Each declaration has previously been sealed in a lower court, including the Third Circuit Court of Appeals, except for two recently obtained declarations (declarations of R.A. and T.A., PD291 to PD296). See Declaration of Michael Z. Buncher, dated July 30, 2002, ("the Buncher Decl."), filed in support of amicus curiae's Motion to Lodge Documents Under Seal. Copies of the applicable lower court sealing orders are attached as exhibits to the Buncher declaration. The materials also include a number of newspaper articles. Buncher Decl. ¶9. Each declaration and article describes the broad array of harms -- including death threats, suicides, physical assaults, vandalism, harassment, ostracism, and instances of lost employment and housing -- that persons who fall subject to the New Jersey Registration and Community Notification Act ("Megan's Law") N.J. Stat. Ann. §§ 2C:7-1 et seq., have suffered once the community learned they were a convicted sex

offender.

The materials under consideration are decidedly relevant to the issue before the Court, namely, whether Alaska's sex offender notification law, which implements notification via the Internet, imposes punishment in violation of the Ex Post Facto Clause of the United States Constitution. In Hudson v. United States, 522 U.S. 93 (1997), the Court ruled that whether a measure imposes "an affirmative disability or restraint" is pertinent to determining if it runs afoul of the Constitution's Ex Post Facto Clause. Id. at 99, citing Kennedy v. Mendoza Martinez, 372 U.S. 144, 168-169 (1963). The materials lodged by amicus curiae are directly relevant to the Court's determination of that issue.

The materials should be sealed because they contain sex offenders' identities, indicate that they are subject to Megan's Law, and provide their home address or area of residence. As explained in the declarations, the public dissemination of this information has led to offenders being exposed to countless harms and threats, as well as to an on-going risk and fear of future injury. See also E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997)(describing harms attributed to Megan's Law notification). In some instances, persons have been threatened and harassed simply for participating in litigation challenging the law's constitutionality.[1] The predictable risks of harm posed by this

[1] When one registrant filed a constitutional challenge to Megan's Law, the Guardian Angels and the media undertook a

information being made public is sufficient reason, alone, for granting amicus curiae's motion to seal. See, e.g., Columbus-America Disc. Group v. Atlantic Mut. Ins., 203 F.3d 291, 303 (4th Cir. 2000) (sealing inventory of recovered property to avoid predictable harm to its value); Leucadia v. Applied Extrusion Technologies Inc.,998 F.2d 157, 166 (3d Cir. 1993) (sealing trade secrets); U.S. v. Criden, 681 F.2d 919, 921 (3d Cir. 1982) (sealing information injurious to third parties); Jones v. Clinton, 12 F.Supp.2d 931, 934 (E.D. Ark. 1998)(sealing names of Jane Does subject to sexual harassment); Doe v. Shapiro, 852 F.Supp. 1256, 1257-58 (E.D. Pa. 1994) (sealing information identifying AIDS patient).

In addition, the documents should be sealed as disclosure of the materials will run counter to confidentiality rules established by the New Jersey Legislature and the State Supreme Court. The majority of the declarations and the newspaper articles contain a sex offender's identity, home address or area of residence, and his official State-determined risk of re-offense level ("tier level"). State law requires that this information may not be disclosed until an offender is first provided with a hearing at which his tier level is determined along with whether, and to what extent, his Megan's Law information should be publically disseminated. Doe v.

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campaign to discover his identity. The registrant's name was eventually broadcast on radio and television, and he later received threatening phone calls and a letter stating, "you need to die." See Declaration of C.W., PD48.

Poritz, 142 N.J. 1, 30-33, 662 A.2d 367, 382-83 (1995). To further protect this information, tier classification hearings are held in camera. Id. at 31, 662 A.2d at 382. Even when a court rules to publically release Megan's Law information, its dissemination is tailored based upon a system where the scope of notification is calibrated to the risk of reoffense posed by the individual registrant. See E.B. v. Verniero, 119 F.3d at 1083. In addition, persons receiving the information may only obtain the offender's home address if they agree in writing not to disclose it to third parties. Paul P. v. Farmer, 227 F.3d 98, 103-104 (3d Cir. 1999). Therefore, public disclosure of the declarations would violate confidentiality procedures observed in New Jersey.[2]

Finally, the offenders who have provided amicus with the lodged materials have done so based upon the assurance that their identities would not be made public. Buncher Decl. ¶11. If amicus curiae are unable to file the lodged materials under seal the Court may be denied relevant, otherwise unavailable, information concerning the impact sex offender community notification laws have on the lives of offenders.

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[2] Similarly, notification via the State's sex offender Internet registry, which operates in conjunction with the above described calibrated notification system, is limited to high risk and some moderate risk offenders, see N.J. Stat. Ann. § 2C:7-13. However, notification via the Internet registry only occurs following a hearing addressing an offender's recidivism risk and appropriate scope of notification.

CONCLUSION

For the foregoing reasons, amicus curiae the Public Defender of the State of New Jersey, respectfully requests that the Court grant this motion for leave to lodge documents under seal.

PETER A. GARCIA
Acting Public Defender
of New Jersey

Dated: By: _____
Michael Z. Buncher
Deputy Public Defender
Counsel of Record
Brian Neff
Assistant Deputy Public Defender

Supreme Court, U.S.
FILED
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No. 01-729

IN THE
Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF DOE I. ET AL.. Respondents

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INTEREST OF THE AMICUS CURIAE

Amicus the Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.[1] EPIC has participated as *amicus curiae* in numerous privacy cases, including most recently *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 122 S. Ct. 2080 (2002). EPIC believes that the invasion of privacy imposed by the Alaska Megan's Law statute, which compels the collection of stigmatizing information and mandates its electronic dissemination, is grossly excessive in light of the statute's purpose.

SUMMARY OF THE ARGUMENT

The Alaska Megan's Law statute permits internet dissemination of stigmatizing information collected from released offenders by the state by mandating that the information in the registry be available "for any purpose ... to any person."[2] Because government posting of registry

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, amicus states that the counsel for amicus authored the brief with the assistance of law students Sara Rose and Jason Young, and PhD student Nicole Anastasopoulos, and that no monetary contributions were made for the preparation or submission of the brief.

[2] Alaska Sex Offender Registration Act (ASORA), Alaska Stat. § 12.62.010 (1999). In its implementing regulations, Alaska provides that it will, in all cases, "provide information in the central registry ... for any purpose, to any person, without charge, by posting or otherwise making it available for public viewing in printed or electronic form." Alaska Admin. Code tit. 13, § 09.050(a) (2000).

information makes this information widely available to individuals not living in geographic proximity to the registrant, the punishment imposed by the statute is excessive.

Where the government compiles private information about an individual, the individual has a valid expectation that the information will not be disseminated indiscriminately. This privacy interest is particularly important today, when information that would otherwise be effectively unavailable is made readily accessible worldwide. Therefore, the government has a duty to impose safeguards and limitations upon its dissemination of such information. This duty can be met by using the principles laid out by the Code of Fair Information Practices to articulate a Megan's Law statute that creates an appropriate balance between the state's interest in protecting its citizens from recidivism and protecting the registrants' privacy interests.

ARGUMENT

I. Megan's Law Statutes Which Permit Registry Dissemination on the Internet Are Excessively Invasive of the Privacy of Released Offenders

Sex offender statutes, based on a particular community's right to know about the presence of sex offenders, do not categorically trump the privacy rights of released sex offenders. Community notification presents the issue of whether actively publicizing the names and criminal histories of released sex offenders violates the right to be free from unwanted disclosure of personal information. Privacy—a right inherent in the Constitution—in the context of released sexual offenders represents a "right to remain anonymous as against their neighbors." Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's*

Sake, 35 AM. CRIM. L. REV. 333, 337 (1998). Although society finds it acceptable to limit the privacy rights of criminals—as demonstrated by the public nature of criminal proceedings and records—sex offender registries should be subject to certain restrictions so that they are no more invasive than necessary to achieve the state's compelling purpose in collecting such information.

The Alaska statute, Alaska Sex Offender Registration Act (ASORA), Alaska Stat. § 12.62.010 (1999), was challenged as a violation of the Ex Post Facto Clause, U. S. Const. Art. I, § 10, for failure to provide fair notice and restrain arbitrary and potentially vindictive legislation. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 1062 (2002) (No. 01-729). Whether a criminal statute violates the Ex Post Facto Clause is a two step-inquiry established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963): (1) is the intent of the statute punitive, and (2) are there any punitive effects of the statute? The seventh factor weighed by the Court in determining punitive effect is whether the sanctions appear excessive in relation to the alternative, non-punitive, purpose of the statute. Under this test, placing sex offender registries on-line—where individuals not living in geographical proximity to the registrant could access the information—is excessive, and outweighs the state's compelling interest in protecting its citizens from a perceived threat of recidivism. The Court should find that where a Megan's Law statute mandates internet dissemination of a sex offender registry, the sanctions are disproportionately excessive under the *Mendoza-Martinez* inquiry.

A. Registrants Have a Protectable Privacy Interest in the Information Disseminated under ASORA

Access to public information such as law enforcement data is a tradition important to American open government;

however, the Court has indicated that a distinction should be made between information that is generally available to the public and compilations of information. Release of the latter—that implicated by dissemination of community notification information—raises questions of privacy that are not present in the former.

In *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), the Court interpreted a provision of the federal Freedom of Information Act (FOIA) that exempted from mandatory disclosure "records or information compiled for law enforcement purposes, 'but only to the extent that the production of such materials . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" The issue was whether disclosure of the contents of an FBI "rap sheet" on a member of an organized crime family constituted the type of personal privacy invasion protected by the FOIA exemption.

A unanimous Court determined that disclosure of the rap sheet implicated the interest "in avoiding disclosure of personal matters." *Reporters Comm.*, 489 U.S. at 762. The subject's privacy interest did not disappear simply because information in the report had previously been available to the public. The Court recognized that the power of the whole (the disseminated compilation) is greater than the sum of its parts (the individual information available to the public): "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Reporters Comm.*, 489 U.S. at 764. Although *Reporters Committee* concerned an application of FOIA, the decision demonstrates that an individual can claim a privacy interest in compilations containing information that may exist in scattered pieces of public information. This privacy interest is greatly affected in

today's society where a "computer can accumulate and store information that would otherwise have surely been forgotten long before." *Reporters Comm.*, 489 U.S. at 771.

When applied to community notification, this distinction implies that offenders have a right to personal privacy with regard to government-maintained compilations that may not necessarily be present with regard to traditional criminal records. Registrants have a right to expect that information compiled by the government for a specific and limited purpose will not be randomly and widely disseminated inconsistent with the statutory purpose. *See* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1195 (forthcoming 2002). This is especially true where the government has compelled the collection of stigmatizing information and promoted its pervasive dissemination. Although the public may have access to the information contained within sex offender registries, the privacy violation is greater when the government compiles the information and then takes steps to widely release it.

The Court subsequently applied the *Reporters Committee* reasoning to again find that an individual still has a privacy interest in information disseminated by the government despite the fact that the information may be obtained from public sources. *See Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496-500 (1997). The Court recognized that, although federal employees' home addresses were publicly available in sources such as telephone books and voter registries, a federal agency's disclosure of the addresses to third parties would unjustifiably invade the employees' privacy: "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *Fed. Labor Relations Auth.*, 510 U.S. at 500. As with rap sheets and compilations of home addresses of federal

employees, sex offender community notification provisions make publicly available a collection of information that, for practical purposes, would not be otherwise available. The mere fact that much of the information is available as part of the public record does not negate the expectations of released offenders that it will not be compiled and publicly disseminated by the state:

> In fact, the Constitution ... also establishes certain responsibilities for the way that the government uses the information it collects. ... [T]he fear of disclosure of personal information collected by the government is a recognized injury, one that can interfere with the exercise of fundamental rights.

Solove, 86 MINN. L. REV. at 1204.

Registration statutes that have survived Constitutional scrutiny have adopted different approaches to both the content and the dissemination of information. Some statutes—such as the Washington statute upheld by the Ninth Circuit—have very limited disclosure listing only the name and vicinity of the registrant rather than an exact address, while others—such as the New Jersey statute upheld by the Second Circuit—tier the registrants based upon post-conviction analyses of the individuals, and release information according to the risk of recidivism. *Compare* Wash. Rev. Code § 9A.44.130, upheld by *Russell v. Gregoire*, 124 F.3d 1079, 1082 (9th Cir. 1997), *with* N.J. Stat. Ann. § 2c:7-1 *et seq.*, upheld by *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997). Both types of notification fulfill the stated intent of registry statutes: to protect citizens from the possibility that the registered sex offender might re-offend, while limiting the invasion of the registrant's privacy. Where the information is not limited and permits access to more than those in immediate geographical proximity to the

individual, as is the case under ASORA, notification schemes do not create an acceptably narrow balance between the public's right to information and the registrant's right to privacy.

B .Widespread Dissemination of Stigmatizing Information Implicates Privacy Concerns

The government does not have unfettered discretion to publish the information it compiles from released sexual offenders. Although the state may disclose some information, offenders are entitled to a measure of protection before the government widely disseminates information about their pasts by posting the information on the internet.

The Court should uphold the Ninth Circuit's recognition that "[b]roadcasting the information about all past sex offenders on the internet does not in any way limit its dissemination to those to whom the particular offender may be of concern." *Otte*, 259 F.3d at 992. Because placing sex offender registries on-line is grossly excessive when weighed against the statutory purpose, such registries have an unconstitutionally punitive effect.

The Tenth Circuit, in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), failed to consider the practical effects of such widespread dissemination of the registry upon those required to register, when analyzing the effect of internet dissemination of a Megan's Law registry under the seventh factor of the *Mendoza-Martinez* test. The court found that internet publication did not work an affirmative disability or restraint on convicted sex offenders because the information in the registry was merely an extension of the "public indictment, public trial, and public imposition of sentence, all of which necessarily entail public dissemination of information about the alleged activities of the accused." *Femedeer*, 227 F.3d at1251. The unlimited access provided by placing the registry on the internet, the Tenth Circuit

concluded, did not make the information any more public. The court wrote further that "[i]nterested individuals must still make an affirmative effort to retrieve the information [on the registry]," thus, "internet notification works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." *Femedeer*, 227 F.3d at 1251.

The Tenth Circuit's position—that the inclusion of sex offender registries on the internet is no more than an extension of an already public record—completely fails to account for the increased privacy invasion caused by internet dissemination of such information. "[T]he Internet provides a much greater ability to aggregate and consolidate information." Daniel Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1409 (2001). The registry contains information the public records do not.[3] Additionally, this position permits those who do not live in that area to view and use the information for reasons unrelated to the statutory purpose.

The Court has previously described the unique nature of the internet in permitting access to otherwise effectively unavailable information:

> Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. ... Taken

[3] For example, the Utah statute upheld by the Tenth Circuit included, in addition to the registrant's identifying information, a description of the individual's vehicle, method of offense, and common targets. *Femedeer*, 227 F.3d at 1250. ASORA requires basic information such as name and address, the vehicle identification number or any car to which the registrant has access (which includes all family cars), employer address, and information regarding any mental health treatment the registrant received since release. ASORA, Alaska Stat. § 12.62.010; *Otte*, 259 F.3d at 984, 987.

> together, these tools constitute a unique medium—known to its users as "cyberspace"—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. ... The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

Reno v. ACLU, 521 U.S. 844, 851 (1997). Because of the uniquely ubiquitous nature of the internet, any negative effects of government regulation—such as invasion of privacy—are magnified. *See Reno*, 521 U.S. at 863 (approving the conclusion of the district court that the unique nature of the internet aggravated the vagueness of the statute).

The *Mendoza-Martinez* test requires the Court to balance the sanction imposed against the purpose of the statute. Because the internet provides unprecedented access to vast amounts of information, worldwide dissemination of the registrant's criminal history is clearly excessive in relation to the state's purpose of protecting local citizens from potential harm.

II. Safeguards are Necessary to Prevent Unwarranted Disclosure of Information Collected by the Government

The Court has recognized that certain safeguards are necessary to guard from privacy-invasive dissemination of information collected by the government. In *Whalen v. Roe*, the Court determined that the collection of prescriptions of addictive medications, required by state statute, was

adequately protected from unnecessary disclosure. However, the Court added:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. ... The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. ... We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data - whether intentional or unintentional - or by a system that did not contain comparable security provisions.

Whalen v. Roe, 429 U.S. 589, 605-06 (1977). As the Court recognizes, procedures must be in place to prevent unwarranted disclosure of personal information collected by the government—even information collected for a compelling government interest (as was the case in *Whalen* and is the case here). Therefore, safeguards must be put in place to ensure that government dissemination of sex offender registries does not unnecessarily infringe upon registrant's privacy rights.

The same issue has been debated in the context of placing public records on-line. Though EPIC is a strong advocate of open government, the organization has long recognized that the widespread dissemination of sensitive information within such records can present serious threats to individual privacy. *See generally* EPIC's Public Records Page, http://www.epic.org/privacy/public_records.html. "Government agencies have begun to place records on their websites, and public records, once physically scattered across

the country, can now be searched or gathered from anywhere in the country." *Solove*, 53 STAN. L. REV. at 1409. As one scholar noted:

> Privacy involves an expectation of a certain degree of accessibility of information. ... [P]rivacy entails control over and limitations on certain uses of information, even if the information is not concealed. Privacy can be violated by altering levels of accessibility, by taking obscure facts and making them widely accessible.

Solove, 86 Minn. L. Rev. at 1178.

Publication of government documents, although important to provide public access to government activities, can represent serious threats to individual privacy when made available without use restrictions. The harms posed in the context of widely disseminated public records have been identified as including increased commercial profiling, predatory targeting,[4] false identification, public or private discrimination, identity fraud, pretexting,[5] and obliteration of

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[4] The Federal Trade Commission filed a complaint in 2001 against companies targeting consumers considered to be greater credit risks and using deceptive marketing to encourage them to refinance debts at high interest rates and purchase high-cost credit insurance. *Fed. Trade Comm'n. v. Citigroup, Inc.*, No. 1:01-CV-606-JTC (N.D. Ga. Dec. 27, 2001). In Florida, a state representative proposed legislation to block the public release of police accident reports following allegations of automobile repair shop owners aggressively marketing their services to accident victims. Alan Judd, *Privacy vs. Public Access: Which Should Prevail?*, SARASOTA HERALD-TRIB., Nov. 2, 1997, at 1F.

[5] For example, 22 year old Amy Boyer was stalked and killed in New Hampshire after a women hired by a private investigator's service, Docusearch, used "pretexting" to obtain her work address. Docusearch obtained Boyer's work address by having a subcontractor, Michelle

social forgiveness. *See e.g.*, *Solove*, 86 Minn. L. Rev. at 1138 ("imagine the ease with which [personal] information could fall into the hands of crafty criminals, identity thieves, stalkers, and others who could use the information to threaten or intimidate individuals").

The harms posed by widespread dissemination of sexual offender records are more specific, and include vigilantism resulting in harm to the offender or harm to innocent third parties mistaken as the offender. *See, e.g.*, Kabat, 35 AM. CRIM. L. REV. at 340. While the Ninth Circuit recognized that hostility from the registrant's community might result from internet dissemination,[6] the use of this information by national groups that wish to target those convicted of sex offenses was not addressed. There have been well-documented examples of vigilante violence taken towards Megan's Law registrants. *See, e.g.*, Megan's Law -

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Gambino, place a call to Boyer. Gambino lied about who she was and the purpose of her call in order to convince Boyer to reveal her employment information--Gambino pretended to be affiliated with Boyer's insurance company, and requested "verification" of Boyer's work address in order to facilitate an overpayment refund. *Remsburg v. Docusearch*, No. 00-211-B (Apr. 25, 2002) (Order of Certification).

[6] One of the plaintiffs in this case suffered community hostility and damage to his business after printouts from the Alaska sex offender internet website were publicly distributed and posted on bulletin boards. *Otte*, 259 F.3d at 988. The Ninth Circuit expressed concern that the employability of registrants in the future would be affected by similar behavior. *Otte*, 259 F.3d at 988.

Not only does listing in such a registry jeopardize the privacy rights of the registrant, members of that person's family are also affected. One of the plaintiffs in this case is the wife of an individual required to register who fears her reputation as a nurse would be affected by a listing which would include her husband's name, her address, and even a description of vehicles driven by members of her household. One can easily see that the adverse effect on the registrant's family may also extend to the registrant's children.

Part IV: Fear and Vigilantism *at* http://incestabuse.about.com/library/weekly/aa082597.htm (Aug. 08, 1997).[7] It is possible—and indeed likely—that there is an increased potential for harm threatened by widespread dissemination of personal information about someone inspiring intense emotions (as do convicted child sex offenders). Such danger was evidenced following the posting of the Nuremburg Files, a website providing a list of abortion doctors with personal information in a manner that some have considered tantamount to a hit list. *See* John P. Cronan, *Free Speech on the Internet: Does the First Amendment Protect the "Nuremburg Files"?*, 2 YALE L. & TECH. 5, http://lawtech.law.yale.edu/symposium/00/comment-cronan.htm (2000); *Solove*, 86 MINN. L. REV. at 1189; *cf. Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 717 (10th Cir. 2000) (following an anonymous posting on an internet bulletin board wrongfully accusing Zeran of profiting from the 1995 Oklahoma City bombings, Zeran received numerous "nasty and threatening" phone calls and death threats). Furthermore, placing information about an individual's criminal history on the internet increases the threat of negative profiling resulting in total destruction of social forgiveness,[8] and the possibility of data entry error.[9]

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[7] For example, upon release of register information, registrants have had their cars fire-bombed, their homes broken into, and have been assaulted, stalked, and harassed. Megan's Law - Part IV: Fear and Vigilantism *at* http://incestabuse.about.com/library/weekly/aa082597.htm (Aug. 08, 1997).

[8] "Social forgiveness" is the principle that over time a citizen's crimes are forgiven by society, that "[h]uman forgetfulness over time puts today's 'hot' news in tomorrow's dusty archives. In a nation of 200 million people there is ample opportunity for all but the most infamous to begin a new life." *Briscoe v. Reader's Digest*, 483 P.2d 34 (Cal. 1971). However, while individuals may petition a court to expunge a criminal record, if a notation of the crime exists in an on-line database, the individual may still be marked as a criminal by profiling companies or employers, and thus,

The District Court of New Jersey addressed a Megan's Law statute providing for internet dissemination of the offender registry. Applying the same test used by the Ninth Circuit, the court held that the widespread dissemination of information about the offenders is more broad than necessary to meet the government's interest in protecting those who might encounter the offender, because "[t]he proposed Internet registry, ... *dispenses with any safeguards designed to carefully limit disclosure of protected information* to individuals and groups with a legitimate public safety-related need for the information." *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 302 (D.C.N.J. 2001) (emphasis added). As the court noted:

> in making the home addresses of a subset of Megan's law registrants available to the general public via the Internet, the Act also permits access to this information by people who will never actually encounter any registered sex offenders in New Jersey nor have any particular need for the information.

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the chances of social forgiveness become lessened as the social recollection of the crime is increased.

[9] *See, e.g.*, Eugene Meyer, *Md. Woman Caught in Wrong Net; Data Errors Link Her To Probes, Cost 3 Jobs*, WASH. POST, Dec. 15, 1997, at C1 (woman's name, date of birth and Social Security number entered in connection with four child protective services cases in error and not corrected for 12 years); Julie Hairston, *Atlanta Police Technology Falls Short*, ATLANTA JOURNAL-CONSTITUTION, Aug. 2, 1998, at C1 (quoting Atlanta Corrections Commissioner describing how Atlanta's Criminal Justice Information System magnifies data entry errors as records move through the system: "We just had an unacceptable rate of inaccurate entries. We've essentially corrected that, but these are still human beings who are entering the data."); Gareth Walsh, *Court Order Causes Reporter Concern - Liability Order Wrongly Issued*, NEWCASTLE JOURNAL, Mar. 25, 1999, at 12 (computer error leads to court order being issued wrongly against innocent person).

> In doing so, *the Act impermissibly strips this protected information of any protection from unnecessary public disclosure.*

A.A., 176 F. Supp. 2d at 302-03 (emphasis added). While some public records are useful to individuals outside the immediate area where those records are made available in a more limited manner, there is little support for the argument that the type of information maintained in sex offender registries is of any use to individuals outside of the area where a potential risk of harm from the registrant exists.[10] Sex offender registries should focus on allowing citizens to track potential harm in their communities as opposed to tracking specific registered individuals; thus, internet access to these particular public records has little connection to the stated rationale for compiling such records in the first place.

Internet dissemination of such information permits the government to make unfettered use of information that would otherwise be effectively unavailable, violating the duty—imposed by the Court in cases such as *Reporters Committee* and *Whalen*—to safeguard private information from unwarranted disclosure.

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[10] Narrower methods exist for making such information available for limited purposes, such as for someone considering moving to a particular area or neighborhood who is interested in statistics regarding local sex offenders. Such methods might include an internet registry that posts general area—but not name or address—of registered offenders, or a provision permitting individualized remote requests to local police stations via mail or facsimile. *See, e.g.*, Reuters, *L.A. to Track Sex Offenders on Internet*, July 30, 2002, http://story.news.yahoo.com/news?tmpl=story&u=/nm/20020731/wr_nm/crime_map_dc_2.

III. A Megan's Law Statute that Provides a Better Balance of the Safety Interests of the Public and the Privacy Interests of the Registrant is Feasible

A sex offender statute that properly balances the interests of the public and the registered sex offender can be created by drafting a law based upon the Code of Fair Information Practices. *See* Kabat, 35 AM. CRIM. L. REV. at 354-56, citing to U.S. Dep't. of Health, Education and Welfare, *Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens viii* (1973).[11] Using the Fair Information Practices as a model, at least one theory for a valid database notification law has been advanced, which suggests that a valid Megan's Law statute can be created by providing the following:

1. *Openness*: making the existence of the database known to all relevant parties;
2. *Duration*: defining a reasonable time during which the registrant will remain in the database if the individual commits no further violation, after which the individual's information will be purged from the database;
3. *Collection Limitation*: the scope of information collection must be clearly defined in terms of the information sources;

[11] For a discussion of the development of Fair Information Practices, see David E. Flaherty, *Protecting Privacy in Surveillance Societies* 352-53 (1989), and Dan Solove and Marc Rotenberg, *Information Privacy Law* (forthcoming Aspen 2002).

4. *Purpose Specification*: the database must clearly delineate its purpose with a direct limitation of use based upon that purpose;
5. *Individual Participation*: the registrant must be allowed to review and correct his or her own records in the database;
6. *Data Quality*: there must be procedures in place to ensure the accuracy of listed information;
7. *Use Limitation*: The geographic and organizational scope of disclosure must be clearly defined; and
8. *Security Safeguards*: there must be mechanisms in place to protect the information in the databases.

See Kabat, 35 AM. CRIM. L. REV. at 354-56. A particular use limitation that would address the concerns of the Ninth Circuit would be to provide only general information about where registrants live on-line, while requiring residents to go to a police station to get the actual addresses, photos and criminal histories of offenders. Such a system has been implemented in various parts of California, where state law prohibits the release of the entire registry over the internet. *See L.A. to Track Sex Offenders on Internet*, *supra*, note 5.

If weighed under the *Mendoza-Martinez* test, a statute carefully crafted under Fair Information Practice principles would survive *Mendoza-Martinez* scrutiny because it would address the particular concerns properly expressed by the Ninth Circuit that such a statute authorize the release only of "relevant and necessary information" within "a 'narrow geographic area.'" Otte, 259 F.3d at 992, quoting *Russell*, 124 F.3d at 1082. In particular, the concept of "use limitation" provides for better protection of the privacy interests of the registrants by safeguarding unwarranted disclosures, a concern expressed by the Court in *Whalen* and

Reporters Committee. In this circumstance, the government would be limited to localized publication, thereby fulfilling the purpose of the statute without unnecessarily infringing upon the registrants' privacy rights.

CONCLUSION

Respondents have a privacy right in the information collected and disseminated by the ASORA. Although the state has a compelling reason for collecting and making available the information in limited circumstances, internet dissemination of such information permits the government to make unfettered use of information that would otherwise be effectively unavailable, thus violating the state's duty to safeguard private information from unwarranted disclosure. The decision of the Ninth Circuit should therefore be affirmed for the reasons stated herein.

Dated: August 2, 2002

Respectfully submitted,

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In The
Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ALASKA CIVIL LIBERTIES UNION, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Alaska Civil Liberties Union is one of its state affiliates. The ACLU and its affiliate maintain a strong and abiding interest in defending fundamental civil liberties from unconstitutional and unwarranted governmental intrusion.

This case raises constitutional issues of critical importance to the ACLU and its members, including the proper meaning of the Ex Post Facto Clause and the distinction between civil regulation and punishment. In furtherance of its organizational views on these matters, the ACLU has often appeared before this Court, both as direct counsel and as *amicus curiae*. *See, e.g., Kansas v. Hendricks*, 521 U.S. 343 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987).

In addition, the ACLU and its affiliates have served, and continue to serve, as direct counsel and *amici* in constitutional challenges to state sex offender and registration laws similar to the Alaska law at issue in this case. *See, e.g., Connecticut Dep't of Pub. Safety v. Doe*, 271 F.3d 38 (2d Cir. 2001), *cert. granted*, 122 S. Ct. 1959, 70 U.S.L.W. 3561 (May 20, 2002) (No. 01-1231); *Russell v.*

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[1] All parties have consented to the appearance of *amici curiae* in this matter, and letters of consent have been lodged with the Clerk of the Court. Pursuant to Sup. Ct. R. 37.6, counsel for *amici* state that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Gregoire, 124 F.3d 1079 (9th Cir. 1997); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001); *Doe v. Williams*, 167 F. Supp. 2d 45 (D.D.C. 2001), *appeal held in abeyance pending this Court's decision in Connecticut v. Department of Public Safety*, 2002 WL 1298752 (D.C. Cir. June 12, 2002).

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The NACDL has filed briefs in many cases before the Court involving the distinction between civil regulation and punishment. *See, e.g., Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 343 (1997); *Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ursery*, 518 U.S. 267 (1996).

Amici file this brief to urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit holding that Alaska's sex offender registration and community notification law ("ASORA") violates the Ex Post Facto Clause as applied to those who committed their crimes before it was enacted. And in so doing, *amici* urge the Court to clarify its Ex Post Facto jurisprudence in a manner consistent with the Clause's historical purpose of protecting against arbitrary and vindictive legislation targeted at society's least-favored persons.

STATEMENT OF THE CASE

In this case, the Court will review for the first time the constitutionality of a state's sex offender registration and notification law. Commonly known as "Megan's Laws," for Megan Kanka, the seven-year-old New Jersey girl whose murder in 1994 by a convicted sex offender prompted the enactment of New Jersey's sex offender registration and notification law, these laws typically require persons who have been convicted of a sex offense, upon their release from custody, to provide the police with such identifying information as their home addresses, a recent photograph, and criminal histories. The laws then authorize the police to disclose this information to members of the public. All fifty states and the District of Columbia have enacted Megan's Laws. *See* United States Department of Justice, Center for Sex Offender Management, *Community Notification and Education* (Apr. 2001) at 4, *available at* www.csom.org.

Pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 ("Wetterling Act"), 42 U.S.C. § 14071, the states are required as a condition of receiving certain federal law enforcement funds to implement a version of Megan's Law that meets certain minimum requirements. For example, the Wetterling Act sets a floor for the types of offenders who must be subject to registration, requiring that all those convicted of a criminal sex offense against a minor, and all persons convicted of a sexually violent offense, be included in states' registries. 42 U.S.C. § 14071(a)(1). In addition, the Wetterling Act requires, at a minimum, that offenders provide the police with current addresses, fingerprints, and photographs. 42 U.S.C. § 14071(b)(1). The Wetterling Act also sets minimum requirements for the frequency and duration of registration. While the

majority of offenders must be required to verify their addresses annually, those deemed "sexually violent predators" – *i.e.*, those convicted of a sexually violent offense who suffer from a mental abnormality or disorder that makes them likely to engage in predatory sexually violent offenses, 42 U.S.C. § 14071(a)(3)(C) – must verify their addresses quarterly. *Id.* at § 14071(b)(3). Furthermore, offenders generally must remain registered for a minimum of ten years; those who have been convicted of an aggravated sexual offense, more than one covered offense, or who are sexually violent predators must register for life. *Id.* at § 14071(b)(6). Finally, the Wetterling Act sets minimum requirements for the extent of community notification, requiring states to "release relevant information that is necessary to protect the public concerning a specific person required to register." *Id.* at § 14071(e)(2).

Thus, the Wetterling Act affords the states considerable discretion in designing their registration and notification laws. For example, the states may expand the range of offenses that subject persons to registration and notification, the types of information required to be disclosed, and the duration of the registration requirement. The states also have discretion to determine how and to what extent they will disclose the information contained in the registry as "necessary to protect the public." *Id.* at § 14071(e)(2). Consistent with that discretion, the states have enacted laws that differ as to each of these elements. *See Community Notification and Education* at 4-9; Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1175 (1999).

Alaska's sex offender registration and notification act ("ASORA" or "the Alaska law") is at the extreme of states' registration and notification laws in every respect. For

example, Alaska subjects to its registration and notification laws not only those persons who have committed the offenses specified in the Wetterling Act, but also those who have committed less serious offenses such as indecent exposure. Alaska Stat. § 12.63.100. It also imposes a minimum 15 years' reporting requirement, five years more than the minimum required by the Wetterling Act. *Id.* at § 12.63.010(d)(1). In addition, Alaska requires offenders to disclose, and makes available to the public, information not enumerated in the Wetterling Act, such as date of birth, work address, and motor vehicle information. *Id.* at § 12.63.010. There is no effort to distinguish between individuals who may pose a risk of future dangerousness and those who do not. Under Alaska law, all persons covered by the Act must provide the required information. There is then no restriction on the use of the information once it is submitted to the registry: ASORA's implementing regulations expressly provide that the information is available "for any purpose, to any person." Alaska Admin. Code. tit. 13 § 09.050(a) (2000).

Indeed, to facilitate its scheme of unlimited notification, Alaska has chosen to post its sex offender registry on the Internet without any restrictions. Thus, anyone in the world who has access to the Internet may view the information contained in Alaska's sex offender registry, without even so much as submitting to the State a request to do so. The Internet site can be searched "by name, partial address, zip code or city," and "includes the offender's name, color photograph, physical description, street address, employer address and conviction information, all under the banner 'Registered Sex Offender.'" *Doe v. Otte*, 259 F.3d 979, 984 (9th Cir. 2001).

Upon passage of the ASORA, respondents John Doe I and John Doe II, both of whom were required to register under the law, brought an action under 42 U.S.C. § 1983 to

enjoin its enforcement, asserting among other claims that the law violated the Ex Post Facto Clause. In 1985, nine years before the ASORA was enacted, John Doe I had entered a plea of nolo contendere to a charge of sexual abuse of a minor after a court determined that he had sexually abused his daughter. He was sentenced to twelve years' imprisonment. After being released in 1990, Doe I was granted custody of his daughter, based upon a court's determination that he was rehabilitated. In 1985, John Doe II entered a plea of nolo contendere to one count of sexual abuse of a 14-year old child. He was sentenced to eight years' imprisonment. Upon his release in 1990, Doe II completed a two-year program for the treatment of sex offenders. *Id.* at 983.

The district court granted summary judgment in favor of the State, and the Does appealed. In an opinion filed on April 9, 2001, and amended on July 24, 2001 and August 9, 2001, the United States Court of Appeals for the Ninth Circuit reversed, holding that the retroactive application of the Alaska law violates the Ex Post Facto Clause.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly applied this Court's precedents to hold that the application of Alaska's sex offender registration and notification law to the respondents violates the Ex Post Facto Clause of the United States Constitution. Specifically, the Ninth Circuit correctly determined that the respondents had established, by the "clearest proof," pursuant to *Fleming v. Nestor*, 363 U.S. 603 (1960), and *Hudson v. United States*, 522 U.S. 93 (1997), that the law was punitive notwithstanding the legislature's attempt to characterize it as civil. In so holding, the Ninth Circuit

appropriately treated the legislature's expressed remedial intent not as "near-controlling," as urged by the State, but as a rebuttable presumption that was overcome by significant indicia of a punitive intent or effect.

In finding that presumption overcome, the Court of Appeals correctly found that four of the seven factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), weighed in favor of finding the law punitive. The court attached particular significance to the seventh factor, the statute's excessiveness in relation to its non-punitive purpose. For the reasons set forth below, the court was correct to do so, in light of the historical concerns of the Ex Post Facto Clause and this Court's analysis in its seminal ex post facto cases. Although this factor alone would not necessarily be sufficient to warrant a finding that the law is punitive, when combined with the three other factors that weigh in favor of a punitive effect, it amply justifies the conclusion that the ASORA is punitive. Accordingly, the statute may not, consistent with the Ex Post Facto Clause, be applied retroactively to those whose crimes predate its enactment.

ARGUMENT

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE ALASKA LAW IS PUNITIVE FOR PURPOSES OF THE EX POST FACTO CLAUSE, NOTWITHSTANDING THE LEGISLATURE'S ATTEMPT TO CHARACTERIZE IT AS CIVIL.

In analyzing the respondents' claim that the Alaska law violates the Ex Post Facto Clause, the Ninth Circuit applied the two-part "intent-effects" test that this Court has established for determining whether a measure

imposes "punishment" for purposes of triggering the protections of the Fifth and Sixth Amendments and, recently, the Ex Post Facto Clause. *See, e.g., Hudson v. United States*, 522 U.S. 93, 99 (1997) (Double Jeopardy Clause of Fifth Amendment); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (Double Jeopardy and Ex Post Facto Clauses); *Allen v. Illinois*, 478 U.S. 364, 368-369 (1986) (Self-Incrimination Clause of Fifth Amendment); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (Fifth and Sixth Amendments generally). Pursuant to this test, the Court "must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Hendricks*, 521 U.S. at 361. This inquiry asks whether the legislature either "expressly or impliedly" indicated a preference for a civil or criminal label. *Ward*, 488 U.S. at 248.

If the legislature indicates a preference for a criminal label, then the inquiry is at an end and the pertinent protections of the Constitution apply. However, if the legislature indicates a preference for a civil label, then the Court must proceed to the second part of the inquiry. Under this second prong, the Court must determine whether the measure is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-249).

In performing the assessment required under the second step of the "intent-effects" test, the Court has directed that the seven factors catalogued in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169, and culled from cases addressing whether a law is "punishment" for purposes of the Fifth, Sixth, and Eighth Amendments, and the constitutional prohibition against bills of attainder and ex post facto laws, should be taken into account. *See Kennedy*, 372 U.S. at 168 and nn. 22-28. These are:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson, 522 U.S. at 99 (quoting *Kennedy*, 372 U.S. at 168-69). Although the Court has repeatedly characterized these factors as only "useful guideposts," which are neither "exclusive nor dispositive," *Ward*, 448 U.S. at 249, and has recognized that the factors "'often point in differing directions,'" *Hudson*, 522 U.S. at 101 (quoting *Kennedy*, 372 U.S. at 169), it has not provided guidance as to the relative weight to be afforded to each of the factors. The Court has advised, however, that no one factor is determinative. *Hudson*, 522 U.S. at 101. It has further advised that the legislature's characterization of a measure as civil will only be overcome by the "clearest proof" that the measure is in fact punitive. *Hendricks*, 521 U.S. at 361; *Ward*, 448 U.S. at 242; *Fleming*, 363 U.S. at 603.

In this case, the Ninth Circuit found that the Alaska legislature had expressed a preference for a civil label for the ASORA and that the legislature acted with a non-punitive intent. *Doe*, 259 F.3d at 986. Nevertheless, applying the *Kennedy* factors, the court found the "clearest proof" that the measure was punitive. Specifically, the court determined that four out of seven of the *Kennedy* factors weighed in favor of finding the measure punitive: that the measure imposed an affirmative disability or

restraint; that it furthered the traditional aims of punishment, retribution and deterrence; that it applied to behavior that was already a crime; and that it was excessive in relation to the alternative purposes assigned, public safety. *See Doe*, 259 F.3d at 987-992. The court of appeals afforded particular significance to the last factor, the excessiveness of the measure. Taking these four factors together, the court of appeals held that they outweighed the three factors pointing toward a non-punitive effect and provided the "clearest proof" necessary to overcome the legislature's stated remedial intent. For the reasons set forth below, the Ninth Circuit's decision should be affirmed.

I. CONSISTENT WITH ITS HISTORICAL FUNCTION OF PROTECTING AGAINST ARBITRARY AND VINDICTIVE LEGISLATION, THE EX POST FACTO CLAUSE REQUIRES MEANINGFUL SCRUTINY OF LEGISLATIVE ACTION.

The State quarrels with the standard of proof applied by the court of appeals in its consideration of whether the legislature's characterization of the measure as remedial was overcome. Specifically, the State contends that, although the Ninth Circuit identified the correct standard – "the clearest proof" – it erred in its application of that standard, by failing to treat the legislature's stated intent as "near-controlling." State's Br. at 20. Pointing out that this Court has "*never* found a law enacted with non-punitive intent to violate the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors," State's Br. at 32, 2, the State argues that the "clearest proof" of a punitive effect will almost never exist, and was not established in this case. State's Br. at 22 ("once it is determined that the legislature intended a civil goal, the ex post facto inquiry

is at an end – except in those truly exceptional circumstances where there is the clearest proof that the legislature's expressed purpose is just a charade for punitive goals"). The State is wrong.

A. The Court Has Never Applied the "Clearest Proof" Standard in the Manner Advanced by the State.

The State's characterization of the legislature's stated intent as "near-controlling" misconstrues the "clearest proof" standard. The phrase, which traces back to the Court's decision in *Fleming v. Nestor*, 363 U.S. 603, 617 (1960), does not create a "near-controlling" presumption that a statute is remedial. Rather, it simply restates the usual rule that statutes are entitled to a presumption of constitutionality, and that mere conjecture as to illicit motives is not sufficient to overcome that presumption. *See E.B. v. Verniero*, 119 F.3d 1077, 1128 (3d Cir. 1997) (Becker, J., dissenting) (noting that presumption is "consistent with familiar canons of statutory interpretation and constitutional adjudication stating that legislatures are rational bodies that intend to function within their powers to enact lawful measures").

Although the State relies on the Court's never having found the "clearest proof" standard met as evidence of the standard's rigor, in fact the Court has not applied the "clearest proof" standard in a manner consistent with the State's characterization of it here. *See Hudson*, 522 U.S. at 115 (Breyer, J., concurring) (explaining that the limitation suggested by the "clearest proof" language is "misleading," and "is not consistent with what the Court has actually done"). To the contrary, each time the Court has invoked the "clearest proof" standard, it has "simply applied factors of the *Kennedy* variety to the matter at hand," *id.*,

and found that these factors did not persuasively demonstrate a punitive intent or effect. Thus, the Court has yet to decide a case in which, on account of the "clearest proof" standard, it held non-punitive a measure for which there were significant objective indicators of a punitive intent or effect.

For example, in *Fleming*, the first case to mention a "clearest proof" standard, the Court found *no* objective indications of a punitive intent. At issue in *Fleming* were amendments to the Social Security Act which terminated benefits to the vast majority of aliens deported. Nestor, who was deported on account of his past membership in the Communist Party, argued that the termination of his benefits violated the Ex Post Facto and Bill of Attainder Clauses. Examining the statute's language and structure, and the nature of the deprivation imposed, the Court found no evidence of a punitive design. 363 U.S. at 616-17. However, urged by Nestor to look to the statute's legislative history for evidence of a purpose to punish those who were members of the Communist Party, the Court warned that "slight implication" and "vague conjecture" would not be sufficient. *Id.* at 617. It was in this context – warning of the "dubious" nature of "[j]udicial inquiries into Congressional motives" – that the Court stated that "only the clearest proof would suffice to establish the unconstitutionality of a statute" on the grounds of illicit legislative motives. *Id.* When the Court finally considered the legislative history of the Social Security Act modifications, it found *no* support for Nestor's claim that they were intended to reach persons, like him, based upon past membership in the Communist Party. *Id.* at 619. Thus, *Fleming* provides no support for the State's assertion that even strong proof of a punitive intent or effect should be essentially ignored whenever the State chooses to attach a civil label to one of its laws.

Similarly, in each case since *Fleming* invoking the "clearest proof" standard, the Court has found little evidence of a punitive intent or effect. In two cases, the Court found that two of the *Kennedy* factors provided mild support for a punitive intent or effect. *See Hudson*, 522 U.S. at 104 (civil fines applied to conduct that was also criminal and served some deterrent purpose); *United States v. Ursery*, 518 U.S. 267, 292 (1996) (same as to civil forfeiture sanctions). In the remaining decisions, the Court found that one or no factors provided such support. *See Kansas v. Hendricks*, 521 U.S. 346, 361-63 (1997) (one factor: civil confinement imposed "affirmative disability or restraint"); *Allen v. Illinois*, 478 U.S. 364, 269 (1986) (no factors weighed in favor of finding civil contempt provisions punitive); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (one factor: civil forfeiture sanctions applied to behavior that was already a crime); *United States v. Ward*, 448 U.S. 242, 250 (1980) (same as to civil fine).[2] Accordingly, the "clearest proof"

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[2] In two additional cases, the Court also found little evidence to establish the "clearest proof" of a punitive intent or effect, although it did not express its decision in terms of the *Kennedy* factors. In *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), the Court considered whether provisions of the Subversive Activities Control Act requiring "Communist-action organizations" to register with the Government imposed an unconstitutional Bill of Attainder. The Court found no evidence that the provisions were not, as they appeared to be on their face, intended to regulate "designated activities" rather than specific persons or organizations. 367 U.S. at 83-86. Similarly, in *Hicks v. Feiock*, 485 U.S. 624 (1988), the Court remanded for further proceedings to determine whether contempt proceedings against a father for failure to pay child support were civil or criminal. Addressing at the outset the father's contention that they were criminal, the Court stated that "one who challenges the State's classification of the relief imposed as 'civil' or 'criminal' may be required to show 'the clearest proof' that it is not correct as a matter of

(Continued on following page)

standard has never actually been applied in a case where there was substantial evidence pointing toward a punitive intent or effect. There is, therefore, nothing in this Court's past cases to suggest that the standard was designed to be the nearly insurmountable hurdle depicted by the State, as opposed to a restatement of the usual presumption of constitutionality to which statutes are entitled.[3]

B. The Deference Urged By the State is Inconsistent with the History and Purpose of the Ex Post Facto Clause.

The "near-controlling" deference urged by the State is not only inconsistent with what the Court has actually done in prior cases, it is also inconsistent with the historical purpose of the Ex Post Facto Clause which was to "prevent[] legislative abuses" like "arbitrary or vindictive lawmaking." *Miller v. Florida*, 482 U.S. 423, 429 (1987). *See also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that the Ex Post Facto Clause checks the "violent

federal law." *Id.* at 631 (citing *Allen v. Illinois*, 478 U.S. 364, 368-69 (1986)). The Court continued, however, "[n]onetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." *Id.*

[3] That the Court did not intend in *Fleming* to announce a new, more rigorous standard for proving claims under the Ex Post Facto Clause is underscored by the fact that in another case arising under the Ex Post Facto and Bill of Attainder Clauses decided just two weeks before *Fleming*, *De Veau v. Braisted*, 363 U.S. 144 (1960), the Court made no mention of a "clearest proof" standard. Moreover, the language of *Fleming* does not reveal an intention to create a new, higher standard of proof or to depart from the traditional Ex Post Facto or Bill of Attainder analysis.

acts which might grow out of the feelings of the moment"); James Madison, *The Federalist* No. 44 at 282 (Clinton Rossiter ed. 1961) ("Ex Post Facto laws . . . are contrary to the first principles of the socia' compact, and to every principle of sound legislation."); Alexander Hamilton, *The Federalist* No. 84 at 511 (Clinton Rossiter ed. 1961) (characterizing the bar against Ex Post Facto laws as among the three "greate[st] securities to liberty and republicanism" in the Constitution); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Cal. L. Rev. 269, 269 (1927).

The basis for the Framers' hostility to ex post facto laws was two-fold. First, the Framers knew from experience that ex post facto laws were unfair "because they deprive citizens of notice of wrongfulness of behavior, and thus result in unjust deprivations." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1276 (1998). Second, the Framers knew that ex post facto laws frequently were the product of "arbitrary and vindictive lawmaking." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (citing cases). As Chief Justice Marshall explained in *Calder v. Bull*, 3 Dall. 386 (1798), the Court's seminal case on the Ex Post Facto Clause:

> The prohibition against [the states'] making any ex post facto laws . . . very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws. . . . With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.

3 Dall. at 389.

Consistent with the constitutional function of the Ex Post Facto Clause as a check against arbitrary and vindictive lawmaking, the Court has historically approached legislation challenged under the Ex Post Facto Clause with skepticism rather than deference. As the second Justice Harlan commented, "the policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part). *See also California Dep't of Corrections v. Morales*, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting) (the "concerns that animate the Ex Post Facto Clause demand enhanced, and not . . . reduced, judicial scrutiny."); Hamilton, *The Federalist* No. 78 at 466 (Clinton Rossiter ed. 1961) (limitations on the legislative authority such as the Ex Post Facto Clause "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

Accordingly, the "near-controlling" deference urged by the State to the legislature's characterization of a measure as civil is unsupported by what the Court has actually done in prior cases applying the "clearest proof" standard, and inconsistent with this Court's traditional approach in ex post facto cases. Indeed, to adopt such a deferential position would be to break faith with the historical role of the Ex Post Facto Clause as an important guardian against arbitrary and vindictive legislation. The court of appeals therefore did not err in its application of the "clearest proof" standard, but applied that standard in a

manner consistent with its prior application by this Court and the purposes of the Ex Post Facto Clause.

II. CONSIDERATION OF THE *KENNEDY* FACTORS DEMONSTRATES THAT THE ALASKA LAW IS PUNITIVE.

The seven factors set forth in *Kennedy v. Mendoza-Martinez* give shape and content to the "clearest proof" standard. They assume that a court will give appropriate respect to a legislature's characterization of a challenged law as civil, but not blind deference to what can on occasion be a self-serving label. They also provide a framework designed to guide a court through a careful assessment of a law's actual purpose and effect.

Here, a majority of the *Kennedy* factors support the conclusion that the ASORA has a predominantly punitive effect and therefore violates the Ex Post Facto Clause. In reaching that conclusion, however, the court of appeals did not engage in a mere arithmetical exercise. Instead, it properly recognized that the relative weight assigned to each of the *Kennedy* factors must necessarily be determined by the history and purpose of the Ex Post Facto Clause. *Doe*, 259 F.3d at 944 n.12. The ASORA is unconstitutional, then, not only because it fails under most of the *Kennedy* factors, but because it fails under the most important.

A. The Majority, and the Most Important, of the *Kennedy* Factors Weigh in Favor of Finding the Alaska Law Punitive.

1. The Law Imposes an Affirmative Disability or Restraint.

First, the law imposes an "affirmative disability or restraint." The Ninth Circuit found that both the registration and notification aspects of the law contributed to the disability: the registration provisions because of their onerous reporting requirements, and the notification provisions because they were likely to render respondents "completely unemployable," and subject them to "worldwide obloquy and ostracism." *Id.* at 988, 994. The Ninth Circuit's conclusions as to the registration provisions turned in part on its understanding that registrants were required to report to police stations in person to fulfill their reporting obligations, *id.* at 987 – a fact that the State vigorously disputes, even as it acknowledges responsibility for the Ninth Circuit's understanding. State's Br. at 39.

Regardless of whether the reporting must be done in person or not, the ASORA's registration requirements plainly restrain respondents' liberty. Respondents are not free to go about their lives as they choose, *contra* State's Br. at 38, but must report to the police on a quarterly or annual basis, more frequently if they change jobs or their residence, for a minimum of fifteen years. Alaska Stat. § 12.63.010. Failure to comply with these requirements is a criminal offense. Thus, by any reasonable interpretation of the term, respondents are subject to a "restraint" upon their liberty.

Even more significant, however, are the effects of the ASORA's notification provisions. By disclosing offenders' work addresses – a detail not required by the Wetterling

Act, *see supra* at 3 – the law "creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." *Doe*, 259 F.3d at 988. As the Supreme Court of Kansas observed in considering a similar notification law, "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment." *Kansas v. Myers*, 260 Kan. 669, 923 P.2d 1024, 1041 (1996).

The impact of these disclosures upon offenders' ability to find work is unquestionably an affirmative disability or restraint by any reasonable definition of these terms. Registrants' ability to work is impaired not only with respect to a single industry, *see Hudson*, 522 U.S. at 105; *De Veau*, 363 U.S. 144, but with respect to all possible means of support. The State's response – effectively, that any sanction short of imprisonment can never constitute an affirmative disability or restraint, State's Br. at 42 – is supported by neither logic nor precedent. Although the Court has frequently repeated the phrase from *Fleming* that the "infamous punishment of prison," *Fleming*, 363 U.S. at 617, is an example of an affirmative disability or restraint, *see, e.g., Hudson*, 522 U.S. at 104, its decisions make clear that other sanctions may constitute affirmative disabilities or restraints. *See Kennedy*, 372 U.S. at 170 (denaturalization); *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (same). *See also Cummings v. Missouri*, 4 Wall. 277 (1866) (loss of ability to work in any profession). So, here too, the impact of the notification provisions of the ASORA upon registrants' ability to maintain employment constitutes an affirmative disability or restraint.

Similarly, the notification provisions' exposure of registrants to myriad forms of discrimination, harassment, and physical danger in their homes and in their daily lives

constitutes an affirmative disability or restraint.[4] Even if such consequences do not materialize for every offender, all offenders must live with the constant threat of them, which in turn impairs their ability to become rehabilitated and reintegrated into society. *See E.B.*, 119 F.3d at 1102 (registrants "justifiably" live in fear of vigilantism); *Community Notification and Education* at 15. These forms of discrimination and harassment, and the threat of them, are additional disabilities imposed by the law. *See Trop*, 356 U.S. at 102 (the "fate of ever-increasing fear and distress" imposed by denaturalization is punitive, even if "all of the disastrous consequences of this fate may not be brought to bear" on a particular person).

Moreover, these disabilities are no less attributable to the ASORA because they require actions by third parties to have their full effect. *See Kennedy*, 372 U.S. at 160 ("grave practical consequences" of loss of citizenship rendered denationalization punitive). As the Court stated in *Cummings*, "the Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." 4 Wall. at 324. *See also Weaver v. Graham*, 450 U.S. at 31 (quoting *Cummings*). "[W]e are not required to shut our eyes as judges to what we must all know as men." *Ross v. Massachusetts*, 414 U.S. 1080, 1085 (1973). *See also Culombe v. Connecticut*, 367 U.S. 568, 606 (1961);

[4] *See Community Notification and Education* at 13-14 (collecting instances of vigilantism as a consequence of notification); *E.B.*, 119 F.3d at 1102 (record demonstrated that registrants had lost employment and employment opportunities, and housing and housing opportunities, as a consequence of notification, and suffered retribution by private unlawful violence and threats). *See also Amicus Brief of the Public Defender of New Jersey* (documenting incidents of vigilantism against sex offenders in New Jersey since the inception of Megan's Law).

Watts v. Indiana, 338 U.S. 49, 52 (1949). It simply defies human experience, including the actual experience in the states that have implemented such laws, to suggest that putting comprehensive identifying information about sex offenders – including where they live, where they work, their physical descriptions, and their criminal histories – in the hands of the public will not cause the offenders to be shunned, put considerable pressure on their employers to let them go, and expose them to grave harm.

Accordingly, the disabilities imposed by the notification provisions of the ASORA are directly attributable to the law and, combined with the registration requirements, unmistakably impose an affirmative disability or restraint.

2. The Law Applies to Behavior That is Already a Crime.

Second, the law applies to behavior that is already a crime. *See Doe*, 259 F.3d at 991. A prerequisite to application of the ASORA is conviction for one of the criminal offenses set forth in the statute. Alaska Stat. § 12.63.100(5). The State and its *amici* do not contend otherwise. Thus, this *Kennedy* factor also weighs in favor of a punitive effect.

3. The Law Serves the Traditional Aims of Punishment.

Third, the Alaska law serves the traditional goals of punishment, *i.e.*, deterrence and retribution. As the Ninth Circuit held, "the threat of being subjected to mandatory registration and, particularly, publicly branded a sex offender, may presumably deter some persons who might otherwise become offenders." *Doe*, 259 F.3d at 990. It further held that the law, in particular its onerous registration requirements, was retributive. *Id.* at 990. The

State and its *amici* do not seriously contest that the statute has a deterrent effect, pointing out instead that measures frequently "'serve civil as well as criminal goals.'" State's Br. at 44 (quoting *Hudson*, 522 U.S. at 105); United States' Br. at 35 (same). While this is true, *see infra* at n.5, it does not change the fact that the factor provides additional support for the conclusion that the ASORA has a punitive effect.

4. The Law is Vastly Excessive in Relation to the State's Interest in Public Safety.

Fourth, the law is vastly excessive in relation to the State's asserted interest in public safety. *See Doe*, 259 F.3d at 991-93. While the ASORA is excessive in numerous respects, *see supra* at 4-5, two aspects of its excessiveness merit particular discussion. Those are the statute's subjection of all registrants to notification, regardless of their risk of re-offense or danger to the community, and its failure to limit notification in any way.

Again, the State does not seriously contend that the ASORA is not excessive. Nor could it. It subjects to registration and notification not only those offenders who may in fact pose a danger to public safety, but also those who plainly do not. The excessiveness of the ASORA in this regard is extraordinary; as the Court of Appeals recognized, "[w]ith one exception, every sex offender registration and notification law that has been upheld has tailored the provisions of the statute to the risk posed by the offender." 259 F.3d at 992. *See also Community Notification and Education* at 5-6 (at least eighteen states use risk assessment instruments or committees to assess an offender's level of notification, based upon the individual's

"similarities and differences from offenders known to have committed new sexual offenses").

All persons who have been convicted of a sex offense simply do not present the same risk of re-offense or pose the same threat to public safety. For example, respondent John Doe I, who had been adjudged by a court to have been successfully rehabilitated and was awarded custody of his minor daughter, plainly does not pose the same threat as a repeat, violent offender who has not been successfully rehabilitated. "Sex offenders are not a homogenous group; reoffense rates vary among different types of sex offenders and are related to specific characteristics of the offender and the offense." *Community Notification and Education* at 15. Thus, undifferentiated notification does not promote public safety; in fact, it undermines it because it distracts the public from concentrating on those offenders about whom they should be most concerned.

Similarly, the disclosure of the information contained in the State's registry without limitation is plainly excessive. Consistent with this common-sense proposition, until recently, most states did not seek to disclose the contents of their registries world-wide, as Alaska has elected from the outset. *See id.* at 8. Rather, the states limited disclosure to those in proximity to a particular offender or those inquiring about a specific offender, a proxy for a need for the information. *See Doe*, 259 F.3d at 993. Indeed, in distinguishing the Alaska law from the Washington registration and notification statute upheld in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), the court of appeals found it significant that "the Washington statute authorized dissemination of information about any particular sex offender only within a 'narrow geographical area.'" *Doe*, 259 F.3d at 992 (quoting *Russell*, 124 F.3d at 1082).

As the court of appeals observed, the punitive effect caused by the ASORA's excessiveness lies in its unnecessary subjection of persons who are not a danger to the public to the statute's onerous registration requirements, and its unnecessary subjection of all registrants to "the unremitting social obloquy and ostracism" that accompanies "being publicly labeled a sex offender on Alaska's world-wide Internet website." *Doe*, 259 F.3d at 993. Similarly, in *Kansas v. Myers*, 923 P.2d at 1041, the Supreme Court of Kansas found that the excessiveness of unlimited public disclosure, even absent posting on the Internet, was the "key factor" in determining that the Kansas notification law was punitive. It explained:

> [the law] places no restrictions on who is given access to the registered offender information or what that person does with the information. The print or broadcast media could make it a practice of publishing the list as often as they chose. Anyone could distribute leaflets anywhere and anytime.

Id. Thus, the court concluded, even though the Kansas law did not provide for any affirmative notification, it "leaves open the probability that a registered sex offender could suffer [considerable] stigma and ostracism." *Id.*

That is even more true in this case, where Alaska has authorized disclosure of the information contained in its registry "for any purpose, to any person." Alaska Admin. Code. tit. 13 § 09.050(a). The State's failure to limit notification to those with a need for the information based upon public safety, or to limit the use of that information for public safety purposes, renders the statute vastly excessive. This excessiveness, in turn, strongly suggests that the legislature's motivation in enacting the ASORA was not to promote public safety, but, instead, was to appease an inflamed constituency that despised sex offenders, the

very situation against which the Ex Post Facto Clause guards.

Even in *Kansas v. Hendricks*, in which the Court upheld against a challenge under the Ex Post Facto Clause Kansas's civil confinement scheme for sex offenders, the Court paid close attention to the tailoring of the statute to its asserted remedial purposes. Critical to the Court's holding were the scheme's limitation to "a small segment of particularly dangerous offenders"; its "strict procedural safeguards"; its segregation of civilly confined offenders "from the general prison population"; its recommendation of "treatment if such is possible"; and its provision for the "immediate release" of an offender "upon a showing that the individual is no longer dangerous or mentally impaired." *Hendricks*, 521 U.S. at 368-69. *See also Kansas v. Crane*, 534 U.S. 407 (2002). No similar tailoring is present in the Alaska statute.

For purposes of the Ex Post Facto Clause, the excessiveness of a measure beyond its remedial purpose is the most significant *Kennedy* factor. A statute is more likely "'to reach the person, not the calling,'" *Fleming*, 363 U.S. at 616 (quoting *Cummings*, 4 Wall. at 320), when it imposes "excessive" disabilities that cannot be justified by the law's ostensibly non-punitive aims. Indeed, the United States agrees that the seventh *Kennedy* factor is deserving of special emphasis when deciding whether a measure violates the Ex Post Facto Clause. As the United States acknowledges, by focusing on the fit between means and ends, the seventh *Kennedy* factor plays a critical role in exposing those measures that are "animated by 'ambition, or personal resentment, and vindictive malice' that target particular individuals for punishment." Br. of the United States at 20 (quoting *Calder*, 3 U.S. (3 Wall.) at 389). Conversely, "where legislation broadly advances a legitimate, identifiable regulatory purpose and its terms are

reasonably tailored to achieve that purpose, such legislative abuses are exceedingly unlikely." Br. of the United States at 21.[5]

This Court has recognized as much. In its seminal Ex Post Facto cases, the Court has based its decisions in significant part on the fit between a measure that the legislature had labeled as civil and its putative regulatory aims. For example, in *Fleming*, the Court upheld a statute terminating Social Security benefits to the vast majority of deported aliens because it found the statute to be reasonably tailored to the government's interest in regulating the Social Security program. Similarly, in *De Veau v. Braisted*, 363 U.S. 144 (1969), the Court found the disqualification of felons from working in the New York shipyards to be

[5] Recognizing the need for the Court to accord priority to certain of the *Kennedy* factors, the State and its *amici* have urged the Court to emphasize factors of their selection. Alaska and *amici curiae* the State Attorneys General urge the Court to place emphasis solely on the sixth factor, whether there is an alternative, non-punitive purpose to which the measure may be rationally connected. State's Br. at 33; State Attorneys General's Br. at 14. This is inappropriate for two reasons. To begin, the first prong of the *Ward* "intents-effects" test already takes into account the non-remedial purpose expressed by the legislature. *See Doe*, 259 F.3d at 985 n.5 (although the second prong of the "intents-effects" test includes an inquiry into the legislature's purpose, that purpose is "necessarily considered in the examination conducted under the first prong (the intent prong) of the test"). Thus, emphasizing the sixth *Kennedy* factor alone would render the second prong of the *Ward* test redundant and extraneous. Second, a measure will rarely be enacted that cannot be connected to some non-punitive purpose. *See Hudson*, 522 U.S. at 102 (sanctions frequently serve "civil as well as criminal goals"); *Ursery*, 518 U.S. at 292 (same). Thus, emphasizing only the sixth factor would render the Ex Post Facto Clause toothless, affording protection against only the least wily of legislatures. To the degree that the United States also places special emphasis on the sixth factor, Br. of the United States at 21, its analysis is similarly flawed.

reasonably tailored to the state's interest in promoting safety in the shipyard industry. But in *Cummings v. Missouri*, 4 Wall. 277, 319, the Court struck down a state constitutional amendment conditioning the holding of any state office or the practice of any profession on the swearing of an oath of past loyalty of the United States, because the Court found that the oath was excessive in relation to any possible qualifications relating to the fitness or capacity of persons for the offices or professions to which it applied. For the same reasons, in *Ex Parte Garland*, 4 Wall. 333, 380 (1866), the Court struck down a federal law requiring a similar oath of loyalty to the United States as a condition of practicing law. Explaining its holdings in these cases, the Court observed that it has rejected ex post facto challenges when "the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau*, 363 U.S. at 160. By contrast, it has struck down as violating the Ex Post Facto Clause restrictions that were not reasonably related to the regulation of any present activity. *See Cummings*, 4 Wall. at 320; *Garland*, 4 Wall. at 382.

Thus, although no one *Kennedy* factor is dispositive, *see Hudson*, 522 U.S. at 101, for purposes of the Ex Post Facto Clause a determination that a measure is vastly excessive in relation to its non-punitive goals should be sufficient when combined with other factors to require the conclusion that the measure has a punitive effect. *See Hudson*, 522 U.S. at 111 (Stevens, J., concurring) (excessiveness "should be capable of tipping the balance in

extreme cases").[6] As the court of appeals held, those are precisely the circumstances presented here.

B. The Remaining Factors Do Not Outweigh the Four Factors Supporting a Punitive Intent or Effect.

The Ninth Circuit found that the three remaining *Kennedy* factors do not support the conclusion that the Alaska law is punitive. These are that the ASORA does not impose sanctions that have historically been considered punishment; is not imposed solely upon a finding of scienter; and can rationally be viewed as advancing a non-punitive purpose. *See Doe*, 259 F.3d at 994.

The Ninth Circuit correctly held that these factors should not be afforded controlling weight. *See Kansas v. Myers*, 923 P.2d at 1040-43 (skipping these factors as "add[ing] little, if anything, to the [Ex Post Facto] analysis"). First, whether the ASORA imposes sanctions historically regarded as punishment is far from clear: although

[6] Of course, different factors may be more significant in contexts involving the Fifth, Sixth, and Eighth Amendments. It is not necessarily the case that a measure that is punitive for purposes of the Ex Post Facto Clause is also punitive for purposes of all other relevant constitutional provisions. *See Hendricks*, 521 U.S. at 394-95 (Breyer, J., dissenting) (Court still has not devised "a single formula" for identifying those measures that must be "constitutional[ly] characteriz[ed] as punishment") (internal quotation marks and citations omitted). *See also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L. J. 775, 798 (1997) ("In a growing number of cases . . . the Supreme Court has concluded that some state actions may be 'punitive' only for the purpose of invoking one or another procedural protection."). Since the only provision at issue is the Ex Post Facto Clause, the Court need not here decide how the analysis would be different, if at all, for purposes of other provisions of the Constitution.

there is admittedly no precise historical equivalent to the ASORA, its notification provisions at least approach the historical punishments of shaming and branding. *See E.B.*, 119 F.3d at 1115-19 (Becker, J., concurring in part and dissenting in part).

Second, whether the measure applies solely upon a finding of scienter is not particularly probative. As the court of appeals observed, the great majority of crimes that subject a person to the Alaska law require scienter. The only exceptions are a few "strict liability" offenses such as statutory rape, deemed to be so harmful that the law effectively assumes scienter. *See Doe*, 259 F.3d at 989. Thus, although the ASORA does not apply *only* upon a finding of scienter, it overwhelmingly applies where scienter has been found – a fact which undermines the weight that should be afforded this factor as well. *Cf. Hendricks*, 521 U.S. at 352, 382 (in addition to those convicted of an offense requiring scienter, civil commitment scheme applied to persons charged with a sexually violent offense but found incompetent to stand trial, and those found "not guilty" because of a mental disease or defect).

Third and finally, whether the measure can be rationally connected to a remedial purpose should not be afforded significant weight. As noted *supra* at n.5, the legislature's characterization of a measure as civil is already afforded significant deference under the first prong of the *Hudson-Ward* analysis. In addition, there will nearly always be a non-punitive purpose that can be advanced in support of a measure. Thus, the State's ability to articulate a non-punitive purpose served by the ASORA is far less revealing than, for example, whether the state's chosen means are, as here, vastly excessive in relation to whatever non-punitive purpose is asserted.

In sum, four of the seven *Kennedy* factors support the conclusion that the ASORA is punitive. Taken together, these factors unmistakably provide the "clearest proof" necessary to require a determination that the law is punitive. And the remaining *Kennedy* factors, even assuming they fall in favor of the State, are plainly insufficient to alter that conclusion.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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GLENN G. GODFREY AND BRUCE M. BOTELHO,

Petitioners,

v.

JOHN DOE I, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF NEW JERSEY, THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY, AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does Alaska's sex offender registration act, Alaska Stat. §§ 12.63.010 *et seq.*, which requires convicted sex offenders to register, and pursuant to which the Alaska Department of Public Safety has made information concerning these offenders available to the public on the Internet, impose punishment and, thus, violate the *Ex Post Facto* Clause of the United States Constitution?

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INTEREST OF *AMICI CURIAE*[1]

This case concerns the constitutionality, under the *Ex Post Facto* Clause, U.S. Const. Art. I § 10, of Alaska's registration and community notification law. New Jersey is generally recognized as the birthplace of these types of laws. In October 1994, acting in response to the sexual assault and murder of a seven-year-old girl, Megan Kanka, New Jersey enacted a sex offender registration and community notification law that came to be known as "Megan's Law." Other states, including Alaska, and the federal government followed suit.

In New Jersey, the Office of the Public Defender represents all indigent persons who are entitled to a court hearing concerning the Megan's Law tier classification or community notification proposed for them by the State. Over the course of the last seven years, that Office has represented over one thousand registrants in such proceedings. Likewise, members of the Association of Criminal Defense Lawyers of New Jersey have represented numerous registrants in such proceedings. The American Civil Liberties Union of New Jersey ("ACLU-NJ"), like its parent organization the American Civil Liberties Union, is a non-profit, non-partisan organization whose mission is to maintain and advance civil liberties in the United States. The ACLU-NJ has acted as direct counsel or *amicus* in

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[1] All parties have consented to the appearance of *amici curiae* in this matter, and letters of consent have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored in any part by counsel for any party. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

many of the constitutional challenges to New Jersey's registration and community notification law, *see, e.g.*, *Doe v. Poritz*, 142 N.J. 1 (1995); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), and is currently co-counsel with the Office of the Public Defender in a challenge to New Jersey's Internet Registry Act. *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001).

Amici's extensive contact with the people who are subject to this type of law places them in a unique position to provide this Court with information bearing upon the matters at issue in this case – in particular, the issue of whether registration and community notification laws impose an affirmative disability or restraint.[2] In addition, considering that this Court's ruling could impact the registrants who are represented by *amici*, we have a clear interest in presenting the Court with information and arguments that bear upon our clients' constitutional rights.

SUMMARY OF ARGUMENT

In ruling that Alaska's notification law violates the *Ex Post Facto* Clause, the court of appeals concluded that the effects of that statute "are unquestionably punitive." *Doe v. Otte*, 259 F.3d 979, 993 (9th Cir. 2001). The court reached that conclusion after analyzing the seven factors

[2] *Amici* have lodged with the Court a number of affidavits, newspaper articles, and other materials that shed light on the experiences of the offenders subject to these laws and other issues relevant to this case. The materials lodged under seal are designated as "PD ___"; those not under seal are cited "DOC ___."

identified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

The court of appeals' determination that an analysis of the *Kennedy* factors supports a finding of a punitive effect was correct. With respect to that court's ruling that the statute's requirements imposed "an affirmative disability or restraint," the record developed in New Jersey over the past seven years paints a dramatic picture of the profound and abiding impact of registration and community notification requirements on the offenders who are subject to these laws. Community notification subjects sex offenders (and their families) to physical attack, threats, vandalism and harassment, and even those who manage to escape these consequences likely live in constant fear of them. In some instances, the offender is driven out of town; in less severe cases he is ostracized. Their ability to maintain suitable employment and housing is severely affected. Faced with these harsh consequences, many registrants have stated that they would prefer to be back in prison. Some have resorted to suicide. In short, life under Megan's Law is a sentence to purgatory – an existence in which offenders remain free from incarceration but are denied the ability to lead anything approaching a normal life.

Additionally, although the state legislators who enacted these laws could have rationally assumed that a non-punitive purpose (*i.e.*, public safety) is furthered by them, there is no credible evidence that notification laws actually do improve public safety. The few studies to address this issue have not found significant evidence that community notification reduces sex offender recidivism. Moreover, there is evidence that these laws, by destabilizing

offenders and interfering with their efforts to obtain treatment, *increase* the risk of reoffense.

ARGUMENT

NOTIFICATION LAWS HAVE A SEVERE IMPACT ON SEX OFFENDERS AND THERE IS NO CREDIBLE EVIDENCE THAT THEY IMPROVE PUBLIC SAFETY.

A. A Brief History of Megan's Law.

New Jersey's registration and notification law was a response to the horrific murder of seven-year-old Megan Kanka on July 29, 1994. The day after Megan disappeared, a convicted sex offender who lived across the street – Jesse Timmendequas – confessed to her sexual assault and murder. Timmendequas was convicted of the crime and is currently on death row in New Jersey. *State v. Timmendequas*, 161 N.J. 515, 536-44 (1999).

Public reaction to the murder was intense. Three thousand signatures were presented to the New Jersey Legislature on a petition demanding action, and within two weeks of the crime, bills providing for registration and community notification of sex offenders had been introduced in the New Jersey General Assembly. This legislation was premised on the belief that convicted sex offenders are uncontrollable recidivists, and on the untested assumption that notifying the community of their whereabouts will help to reduce that recidivism. However, these assumptions were given little scrutiny – the legislation passed under emergency suspension of the rules so as to eliminate hearings in the New Jersey Assembly, and all

but the briefest of hearings in the New Jersey Senate. By October 20, a package of bills was approved by the Legislature and Governor Whitman signed them into law on October 31, 1994, just three months after the murder.

Among the new laws was a broad registration and community notification provision, N.J. Stat. Ann. 2C:7-1, *et seq.* ("the New Jersey statute"). The registration aspect of the New Jersey statute requires that "repetitive, compulsive" sex offenders register every ninety days; all other sex offenders must register annually. The extent of community notification for a given registrant depends on their determined risk of reoffense. For high risk ("Tier 3") registrants, notices are distributed to private residences, businesses, schools and community organizations in the area(s) where the offender lives and works. For moderate risk ("Tier 2") registrants, notices are provided to schools and community organizations in those areas. Notification concerning low risk ("Tier 1") offenders is provided only to law enforcement. The New Jersey statute is extremely broad in terms of the offenders who are subject to its requirements. N.J. Stat. Ann. 2C:7-2.

The New Jersey statute has been the subject of a number of constitutional challenges. That litigation resulted in the creation of due process hearings, in which registrants are afforded judicial review of the proposed tier designation and proposed scope of notification, and led to a tailored form of community notification which limited notice to only those likely to encounter the registrant. With these and other requirements in place, the New Jersey statute was upheld. *Doe v. Poritz*, 142 N.J. 1 (1995); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

Consistent with these court decisions, for over seven years notification has been provided by the police to those likely to encounter an offender, based upon geographic proximity. As of March 1, 2001, 5,720 registrants had been classified, with 325 classified in Tier 3, 3,007 classified in Tier 2, and 2,388 classified in Tier 1.

In the year 2000, however, tired of the restraints on notification imposed by the courts, the Legislature and the voters of New Jersey approved an amendment to the State Constitution which purports to remove any state constitutional impediment to any sex offender community notification law to be enacted by the Legislature. N.J. Const. of 1947, Art. IV, § 7, ¶ 12. Accordingly, on July 23, 2001, the Governor signed into law the Internet Registry Act. N.J. Stat. Ann. 2C:7-12, *et seq.* The Act authorizes the creation of a central sex offender registry, available to the public through the Internet "without limitation." N.J. Stat. Ann. 2C:7-13(b). Litigation concerning the constitutionality of the Internet law and the constitutional amendment is currently pending. The sex offender Internet registry became operational on February 21, 2002.

B. Notification Laws Have a Devastating Impact on Sex Offenders and Their Families.

In assessing the specific *Kennedy* factors, most notably "affirmative disability or restraint," it is important to ascertain the real-life impact caused by disclosure of an individual's sex offense history, coupled with identifying information such as his photograph and current home address. For a registrant subject to notification, any hope of redemption, or at least the possibility of leading a somewhat normal life, is illusory. Many registrants are

subject to physical or verbal assaults; others live in a state of constant fear that they too will be attacked. Employers turn them away, fearing that customers will boycott the business if the registrant's history is discovered. Landlords evict them in order to placate the fears of other tenants and neighbors. Through all of this – the classification as a "sex offender" and the resulting, and, indeed, intended, ostracism by the community – the message to the offender is unmistakable: he is a monster, unfit to be treated as an equal member of decent society. The resulting psychological burden is tremendous.

Perhaps the most dramatic cases illustrating the impact of community notification are those in which registrants have been physically assaulted after the community learned of their offense. Consider the following examples:

F.G. F.G. was paroled in 1992 after serving time for a 1975 offense. After his release, he completed an alcohol abuse program, received mental health counseling, and remained offense-free. In 1998, six years after F.G. gained his freedom, notification was distributed to the community. The very same day the notices went out, members of the public began to harass and threaten F.G. Although the notices were distributed only to F.G.'s neighbors, local newspapers were provided with the information and they published stories about F.G.'s presence in the community. A few days later, F.G. received an anonymous letter that read, "We'll be watching you asshole." This message was spelled out using letters cut out from a magazine. Late that same evening, someone fired five shots from a high caliber handgun into F.G.'s home. Several bullets almost hit one of F.G.'s family members. The shooting generated additional publicity and by 4:30 in the afternoon the next

day, a crowd of about 250 people had gathered in front of F.G.'s home. The stress of these events caused F.G. to fear not only for his own safety, but also for the safety and well-being of his family. He checked himself into a hospital and was placed on a suicide watch. F.G. stated that community notification "is a far worse punishment than jail ever was." (PD 1-20.)

M.G. This registrant was released from prison and moved in with an aunt and uncle. About two weeks after his release, notices were distributed. Eleven days later, two men broke into M.G.'s house in the middle of the night. There was a house guest sleeping on the sofa and one of the intruders began to beat this guest, while yelling "Are you the sex offender?" Meanwhile, the other intruder threw a beer bottle through the front window. There were a number of newspaper articles regarding this incident. When M.G. later applied for a job, he was told that because of the publicity, the company would not hire him. (PD 21-25.)

R.R. This registrant was released in 1995 after serving time for a 1986 offense against his stepdaughter. Notices were distributed approximately two weeks after his release. Shortly after the notification was conducted, R.R.'s neighbors started calling him "child molester" when they saw him, and one woman threatened to kill him if he went near her children. R.R.'s landlord told him that the neighbors were complaining about him and he would have to leave. R.R. was later physically assaulted on three separate occasions by people who called him "child molester" or "pervert." On the last of these occasions, three men jumped R.R. from behind and started kicking and punching him, while saying things like, "You like little children,

right!" A number of bystanders witnessed the attack, but no one helped. (PD 89-95.)

C.D. In 1999, this registrant was classified a low risk offender. About a year after that determination was made, a detective from the local police department called and told him that someone was mailing people in the community copies of an old newspaper article about C.D.'s offense. A short time later, C.D. started to experience threats and harassment. People would throw garbage on his lawn, or ring his doorbell late at night and run away. On other occasions, people would drive by C.D.'s home and yell out, "Stop fucking little girls. I'm going to kill you." Then late one evening C.D. heard a knock at his front door. C.D. looked through the door's window and did not see anyone. However, when C.D. then opened the door, a man who had been crouching down in front of the door stood up. The man was wearing a ski mask and carried a handgun. He pointed the gun at C.D. and said, "If you don't get out of this neighborhood I'm going to kill you." The man then turned and fled. (PD 222-25.)

J.H. He was classified a moderate risk offender and notices were distributed to local schools. In August 2001, after the notices were sent out, J.H. went to a party at a neighbor's home. Another guest at the party confronted J.H., yelling: "People like you who are under Megan's Law should be kept in jail. They should never let you out. People like you should die. When you leave tonight, I'm gonna kill you." J.H. left the party but the other guest followed. The guest caught up with J.H. and struck him with a crowbar. J.H. was able to escape, called the police and was taken to the hospital for treatment. (PD 235-37.)

Even those registrants who are not attacked feel the effect of these assaults. The Third Circuit Court of Appeals reviewed the record of these types of incidents in New Jersey and concluded "they happen with sufficient frequency and publicity that registrants justifiably live in fear of them." *E.B.*, 119 F.3d at 1102.

More common than physical assaults are instances where registrants are subjected to threats or harassment. In one case, after community notification was conducted, a local newspaper published a front page story about the registrant, L.M., under the headline, "PREDATOR AMONG US." L.M. then found that strangers were making threatening gestures towards him, and he was informed that there was a contract out on his life. He contacted the local prosecutor, who confirmed that his life was in danger. (PD 227-29.) Another registrant had a large rock thrown through the window next to where he was sleeping. The rock had a note attached, which read: "YOUR DEAD." (PD 232.) Many other instances where registrants have been threatened with death or bodily harm have been documented. (*See, e.g.*, PD 299 (neighbor tells reporter offender "should have been destroyed"); PD 109 (victim's friend threatened to "beat the crap out of [registrant]"); PD 102-03 (group of men threatened registrant, stating "we know where you live," and later beat him with broom handle and threw bottles at him); PD 126-27 (registrant received anonymous threatening letter); PD 135 (neighbor screamed obscenities at registrant's wife and said he intends to kill both of them); PD 268-72 (registrant received threatening letter after regular notification was disseminated and threatening phone calls after Internet notification was later conducted); PD 286-87 (people drove by registrant's home and yelled, "we're going

to get you"); PD 238-46 (anonymous callers threatened registrant and his wife, stating they would burn down registrant's home, or "we will cut your body up in little pieces").)

On other occasions, registrants have had human feces placed on the front steps of their home (PD 114), ground glass placed under the tires of their car (PD 143), their tires slashed and cars vandalized (PD 109, 117, 233, 295), raw eggs thrown at their car (PD 110), mail boxes destroyed (PD 286) and their homes broken into (PD 85). Harassing telephone calls are another common tactic. (PD 239 (callers scream "move the fuck out of here"); PD 238-46 (numerous harassing and threatening calls); PD 250 (same); PD 277 (numerous harassing telephone calls late at night).) Registrants also are frequently called various derogatory names when they go out in public. (PD 286 ("child-fucker"); PD 240 ("rotten son of a bitch"); PD 198 ("kid fucker").)

In many instances, registrants do not report these incidents because they believe, justifiably or not, that the police will have little interest in protecting them. (PD 127 (registrant subjected to threats indicates he "received no help from any law enforcement agency"); PD 102 (registrant did not report threats to police because he believed police were responsible for unauthorized disclosures of his status as registered sex offender); PD 217-18 (registrant was afraid of police because of way they had treated him in past).)

The level of fear and hatred of sex offenders runs so high that disclosure of a registrant's presence in the community may fulminate a witch hunt-type atmosphere in which town members band together to wage a coordinated campaign to persecute the offender and drive him out of town.

C.W. was convicted of sexual assault and murder in the mid-1970's. He was released from incarceration in 1989. After his release, he lived as a law-abiding citizen, obtained full employment, was able to purchase a home, and became an active church member. C.W. was the plaintiff (under the fictitious initials "E.B.") in one of the early suits challenging the constitutionality of the New Jersey statute. That court case generated considerable media attention. The initial media reports identified the town in which C.W. was living, but did not provide his name. However, the Guardian Angels – a citizen "safety patrol" group – went to C.W.'s town and handed out leaflets seeking information on C.W.'s whereabouts. (PD 61.) One Guardian Angel told a reporter, "we are going to be here every day until we find this rapist." (PD 64.) A few days later, a local political leader revealed C.W.'s identity on a New York radio talk show. (PD 53-54, 67.) The Guardian Angels then began handing out fliers which stated, "'E.B.,' we know who you are," and provided C.W.'s name and address. (PD 68.)[3] A crowd of reporters gathered in front of C.W.'s home that evening. (PD 54.) C.W. immediately began to receive threatening phone calls, as well as an anonymous letter that stated, "you need to die." (PD 69.) C.W. and his family were ostracized by the community and

[3] The uproar over C.W. was so intense that the federal district judge presiding over C.W.'s case and the attorney representing C.W. became targets as well. The same political figure who revealed C.W.'s name and address also disclosed on the Internet the home addresses of the judge and C.W.'s attorney. In addition, leaflets were distributed to the neighbors of the judge and the attorney, asking the neighbors to treat them as "social outcasts." (PD 70-73.)

lived in constant fear that they would be attacked. C.W. also lost his job. (PD 53-60.)

The events surrounding the release of registrant C.D. were similar. When the media learned that C.D. had moved in with his mother upon his release from prison, a group of at least twenty reporters descended upon the mother's home, stationing themselves in front of her building for over a week. The police had to be called to the scene to ease traffic congestion. C.D.'s family was afraid to leave the apartment, and when they did leave were harassed by the media. Reacting to the controversy, a local councilman made a public statement that he did not want individuals like C.D. living in the community. In addition, as with C.W., the Guardian Angels got involved. They distributed fliers and the leader of that group gave a press conference at a school across the street, stating that he was "going to hunt [C.D.] down, like one hunts an animal." (PD 35.) C.D. was so terrified by these events that he fled the country. (PD 31-46.) However, according to newspaper accounts, the Guardian Angels learned that C.D. had moved to Puerto Rico, followed him there, and distributed warning fliers in the area of his San Juan address. (PD 25b.)

In another case, a registrant identified as "Affiant 17" was living in a boarding home located for him by the staff at the psychiatric hospital where he was previously committed. When town residents learned that he and two other sex offenders were living in the community, they formed a "watchdog group" focused on driving the offenders from the community. Echoing common misconceptions about sex offender recidivism, one resident said, "These guys -- if they strike one time – they will strike again." (PD 189.) The watchdog group distributed leaflets encouraging other residents to attend a town council meeting. At the meeting,

residents confronted the owner of the boarding home, demanding that the registrant be evicted. The owner apologized and agreed to force the registrant out. A number of newspaper articles were published concerning these events. (PD 183-90 ("Neighbors Working to Oust Sex Offenders"; "Sex Offenders Are Not Welcome Here").)

Registrant J.D. had a similar experience. J.D. was incarcerated in prison for six and one-half years for a sex offense, then transferred to a psychiatric hospital for treatment of his bi-polar disorder. He was released from the hospital after approximately five months; his discharge plan called for him to live with his wife and son. However, when it became apparent that notices would be distributed to his family's neighbors, J.D. decided to leave the home rather than subject his family to community notification. J.D. subsequently moved into an affluent community close to his place of employment. Community notification was conducted, setting off a quick and vocal reaction from the public. The local newspaper ran a number of articles about J.D., describing the widespread fear his presence was causing. (PD 156-59n.) A town meeting was held, where residents asked local officials what could be done to force J.D. to leave. (PD 152-59.) Throughout this period, J.D. was subjected to harassment and received a number of threatening phone calls. J.D. later moved out of town. (PD 154, 159m; *see also* PD 238-46 (registrant E.S. and his wife were subjected to repeated harassment and threats, including callers threatening to burn their house down if they did not leave, and were told that a group of neighbors retained an attorney and met with mayor to see if they could force E.S. to move out of town).)

In some instances, even a rumor that a sex offender is living in the community can set off this type of a reaction.

Registrant J.P. moved into a community and local police were notified of his presence. Although no notification was conducted, a rumor quickly spread that there was a sex offender living in town. The police came to J.P.'s home and informed him that they had received "hundreds of angry telephone calls" concerning him. (PD 84.) Local officials called a town meeting to address this issue and approximately 250 residents attended. The meeting was reported in the local newspaper. (PD 87-88 ("Sex-offender rumor draws 250 to forum").) Shortly after the meeting, J.P. found himself subject to a steady stream of harassment. Over the ensuing years, J.P.'s car was repeatedly vandalized and his home was broken into on a number of occasions. (PD 83-88.)

Given the strong public reaction that community notification can ignite, it should not be surprising that the New Jersey law has done tremendous damage to registrants' prospects for employment and housing. With respect to employment, even employers who are willing to hire former convicts may draw the line at sex offenders because the employers reasonably conclude that their business cannot afford to run the risk that the community will learn a sex offender is working there.

That is what occurred to registrant W.L. He was hired by an oil company and worked for the company for about two and a half years. When the State sought to classify W.L. as a tier three sex offender, W.L.'s employer wrote to the judge, stating that W.L. "has demonstrated outstanding performance. He has shown his ability to be an excellent worker and I find him to be a highly respected person in our company." (PD 129.) Nevertheless, tier three notification was ordered. After notification, W.L.'s supervisor received phone calls from customers threatening to

take their business elsewhere because of W.L. A few days later, the employer told W.L. that the company was letting him go because of the impact community notification was having on the business. (PD 123-33.)

The record developed in New Jersey contains many other examples of instances where community notification has interfered with registrants' attempts to secure and maintain steady employment. (PD 160-63b (numerous residents complained to employer within hours after notification was conducted, and registrant quit that afternoon rather than see employer's business hurt); PD 76 (registrant fired after tier three notice distributed); PD 280 (owner hired registrant knowing he had a criminal record, but fired him when he learned it was a sex offense, stating: "I am afraid that business might be hurt if people know that a sex offender works here. I can't take that chance."); PD 206-08 (potential employer indicated he would not hire registrant without an assurance there would be no community notification); PD 24 (registrant not hired because of publicity accompanying notification); PD 101 (registrant lost job after reporter contacted employer concerning registrant); PD 57 (registrant C.W. lost job of six years shortly after his identity was revealed on radio and in newspaper); PD 247-51 (registrant lost a number of jobs because of sex offense history, resulting in disabling depression).)

Like employers, landlords are sensitive to the economic harm they may sustain if their tenants or the public-at-large learns that they are providing housing to a sex offender. Consider the case of J.R. When J.R. was 13 years old, he committed a sex offense against a younger sibling. Although there was no history of J.R. preying upon the community-at-large, tier two notification was ordered.

J.R., who was 17 or 18 years old by this time, was living with an uncle. When the uncle's landlord learned that a sex offender was staying there, the landlord told the uncle that if J.R. did not leave they both would be evicted. Left with little choice, the uncle told J.R. he had to leave. J.R. was homeless for a while, moving from one friend or relative's home to another. J.R. also lost his job upon his employer being notified of J.R.'s juvenile offense. (PD 78-80.)

Registrant A.E. was rendered homeless and lived on the streets for five months as a result of community notification. He had made excellent progress at the treatment facility for convicted sex offenders. Following his release, he obtained housing and employment, receiving excellent reports from his employer, and was able to buy a car. After seven months of successful placement in the community, notification was conducted, resulting in the loss of his job and apartment. While he was homeless, A.E. was arrested for shoplifting. (PD 75-78; *see also* PD 165 (owner advised registrant he would have to leave if community notification required, because owner feared harassment from neighbors and police); PD 121 (landlord informed registrant he was evicted after community members complained of registrant's presence and vandalized landlord's car); PD 91 (landlord changed locks on registrant's apartment after receiving complaints from neighbors); PD 259-67 (employer who provided housing for registrant on horse farm evicted him because of effects of community notification, even though registrant was "an excellent worker"); PD 273-75 (registrant required to inform landlord of sex offense was evicted and had difficulty obtaining new housing); *cf.* PD 126 (landlord received anonymous phone calls and complaints from friends about

renting apartment to registrant); PD 305 (owner of home identified as registrant's residence threatened after notification distributed); DOC 185 (owners association passed regulation barring sex offenders).)

Faced with this sort of response from the community, some offenders opted to flee the state rather than subject themselves or their families to community notification. (PD 305 (offender moved to Puerto Rico); PD 297 ("Notification law drives ex-con to Pennsylvania"); PD 298 ("Feeling the heat, freed offender flees N.J." (offender moved to Texas)); PD 47 (offender who was subjected to public leafleting left New Jersey because of fear of harassment and vigilante tactics); PD 200 (registrant and his family moved out of New Jersey in attempt to escape harassment); *cf.* PD 289 (registrant left town after the chief of police told him: "If you move here and register I'll make your life a living hell.").)

In the case of A.A., he moved out-of-state with his wife and children to spare his family the trauma of community notification. (PD 171-75.) Nevertheless, the family members who stayed behind were subjected to harassment. On two occasions, people who identified themselves as members of a Megan's Law citizens group appeared at the front door of A.A.'s mother-in-law. The group members demanded to know where A.A. was living and attempted to enter the home to confirm that A.A. and his children were not staying with her. (PD 176-80.)

In short, community notification can have a severe impact on registrants and their families, and carries consequences that potentially permeate every aspect of their lives. *See E.B.*, 119 F.3d at 1107 ("Notification puts the registrant's livelihood, domestic tranquility, and personal

relationships with all around him in grave jeopardy. This jeopardy will not only extend to virtually every aspect of the registrant's everyday life, it will also last at least 15 years."); *Otte*, 259 F.3d at 987 (concluding that notification "subjects [the offenders] to community obloquy and scorn that damage them personally and professionally").[4] Left with little hope of ever leading a normal life, in a few instances, registrants have opted for what they likely viewed as the only remaining route of escape – suicide.

The mother of registrant J.K. provided a declaration in which she described the circumstances that led to her son taking his own life. His offense involved J.K. having consensual sexual relations with a 15-year-old girl when he was 21. Upon his release from jail, J.K. moved back into the family home in a small town in southern New Jersey. Shortly after J.K.'s return, the family began to receive threatening phone calls. When J.K.'s mom would answer the phone, the callers would say things like, "tell your son that his days are numbered." (PD 217.) Following these threats, J.K. was physically assaulted on a number of occasions. In one of these beatings, the men who attacked J.K. punched him in the face and kicked him, telling J.K. he had "better move out of state." (PD 218.) In

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[4] These sorts of problems are not unique to New Jersey. A Department of Justice study of the impact of Wisconsin's notification law summarized interviews with thirty offenders. Eighty-three percent of the offenders said that notification resulted in "exclusion from residence"; seventy-seven percent reported "threats/harassment"; sixty-seven percent reported "emotional harm to family members" and "ostracized by neighbors/acquaintances"; and fifty percent reported "loss of employment." U.S. Dep't of Justice, National Institute of Justice, "Sex Offender Community Notification: Assessing the Impact in Wisconsin," at 10 (Dec. 2000) (hereinafter "*Wisconsin Study*").

addition to these problems, J.K. was unable to find work, and his girlfriend of two years broke up with him, telling him that she felt she would never be able to live a normal life with him because he was a sex offender and subject to Megan's Law. (PD 217-20.)

Faced with all this, J.K. became severely depressed and began to talk of suicide. His mother convinced him to go see a psychiatrist, but that did not seem to help. In despair, J.K. told his mother, "I have no hope. . . . What is left for me? I will be subject to Megan's Law for the rest of my life." (PD 220.) Two days later, J.K. shot himself to death in the driveway of his sister's home. (PD 219-20.)

There have been other Megan's Law-related suicides of registrants in other states. In a small Maine town, the police distributed fliers notifying residents that a convicted sex offender, Thomas Varnum, had moved into their community. Two days later, Varnum killed himself with a shotgun. He left behind an audio tape in which he said that he "couldn't go on living in a world where there was no forgiveness." (PD 171, 175.) In California, a sex offender, Michael Patton, hung himself from a tree five days after notices were distributed. (PD 163.) In New York, an investigator went to Edward Wood's home to advise him of his obligation to register. Wood went into another room, ostensibly to look for identification, and killed himself with a shotgun. (PD 161.) Other suicides have been reported, including suicides by family members of sex offenders. (PD 164 (therapist refers to two patients who committed suicide after being targeted by Megan's Law); DOC 157 (referring to two suicides in Britain that may be linked to newspaper's campaign to identify sex offenders); DOC 178 (teenage girl in Texas shot herself to death after her father's photo appeared on Internet registry, embarrassing her at

school); *cf.* PD 293 (stress of community notification caused registrant to relapse into depression; registrant said he does not want to live, and locked himself in bathroom with razor blade, threatening to kill himself); PD 301 (Texas offender attempted suicide after judge ordered him to put sign in front of his residence: "DANGER REGISTERED SEX OFFENDER LIVES HERE").)

It is important to bear in mind that most of the harms described above occurred under a system of "limited" community notification, such as the pre-Internet law New Jersey system, in which notification was provided only to those "likely to encounter" the registrant. The world-wide Internet notification schemes more recently adopted by Alaska and New Jersey are likely to increase exponentially the harm caused by notification (including the risk that persons far away will use the mail system to harm registrants) – without any attending increase in public safety.[5]

C. The Available Evidence Suggests That Notification Laws Increase the Risk to the Public.

Clearly, providing notification to persons who are not likely to encounter a registrant does not foster public safety. Indeed, it has never been shown that providing notification even to those who are likely to encounter an

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[5] Internet notification need not be world-wide. Among the materials lodged by *amici* is a declaration from a computer technology expert who indicates that, through the use of a password and geolocator system, access to Internet registry information concerning a particular offender could easily be restricted to only those likely to encounter that offender. (DOC 1-7.)

offender reduces recidivism. Contrary to the assertions of petitioners and their supporting *amici*, the existing evidence indicates that notification laws have no significant effect in lowering recidivism. Rather, there is reason to believe that these laws actually increase the risk to the public.

In the time since the New Jersey statute was enacted, New Jersey's Department of Corrections has conducted a number of studies of the recidivism rates of released sex offenders. Those studies indicate that relatively few commit another sex offense.[6] These findings are consistent with

[6] The conclusions reached by these studies included the following:

Of the 115 inmates released in 1994 from the sex offender treatment facility ("Avenel") where offenders found to be "repetitive, compulsive" are incarcerated, 7 (6%) were re-convicted of a sex offense in the five year period following their release. (DOC 114.)

Of the 123 inmates released from Avenel in 1995, 8 (6.5%) were re-convicted of a sex offense in the five year period following their release. (DOC 108.)

Of the 79 inmates released from Avenel in 1990, only 3 (3.8%) were re-convicted of a sex offense in the ten year period following their release. (DOC 101.)

Of the 507 inmates released from Avenel during the years 1994 through 1997, 34 (6.7%) were re-arrested for a sex offense in the three year period following their release. This rate was not significantly higher than the re-arrest rate for sex offenders who served their sentences in general population, rather than at Avenel, and maxed out on their sentences. For that group of 226 offenders, 14 (6.2%) were re-arrested for a sex offense in the three year period following their release. (DOC 94.)

The recidivism rates for the sex offenders studied were "substantially lower" than the rates for all inmates released in 1991. (DOC 97.) For example, the study that looked at

(Continued on following page)

research conducted elsewhere, which indicates that, as a group, sex offenders have lower rates of recidivism than other types of offenders. (Brief of *Amicus Curiae* Massachusetts Committee For Public Counsel Services; *see also* U.S. Dep't of Justice, Center for Sex Offender Management, *Myths and Facts About Sex Offenders* (August 2000) (hereinafter "*Myths and Facts*") (listing as a "myth" statement that "[m]ost sex offenders reoffend"); DOC 15, 50, 72, 83.)[7]

sex offenders released between 1994 and 1997 concluded that these offenders were significantly less likely to be re-arrested (32% vs. 53%), and less than half as likely to be re-convicted (20% vs. 41%). (*Id.*) Note that these numbers are for re-arrests/re-convictions for any type of offense, not just sex offenses.

Considering that in 1999 New Jersey enacted a civil commitment law for sexually violent predators, N.J. Stat. Ann. 30:4-27.24, *et seq.*, and, therefore, the most dangerous sex offenders are now being civilly committed when they complete their sentences, presumably the recidivism rates would now be even lower.

[7] The discussion of recidivism contained in the *amicus* brief filed by the Solicitor General is disingenuous. That brief, for example, cites one study to support a "43% recidivism rate" for sex offenders (SG Br. at 4 n. 2) – without disclosing: (1) that this study looked only at offenders classified as a high risk to re-offend; (2) that this particular recidivism rate was for juveniles; or (3) most importantly, that this finding was based on a sample size of only 14 juvenile offenders. (DOC 128; *cf.* DOC 83 (referring to five studies of a total of over 700 juveniles that found recidivism rates between 2.5% and 10%).) The more germane finding of this study was that only 14% of the 125 high risk adult offenders studied were arrested for a new sex offense. (DOC 133.) The Solicitor General also cites two Bureau of Justice Statistics ("BOJS") studies to support the assertion that "convicted sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon." (SG Br. at 3-4.) The studies do not support that assertion. To the contrary, the 2002 study lists sex offenders as one of the offender categories having "the lowest rearrest rates" (for any type of new

(Continued on following page)

The common assumption that community notification reduces recidivism has never been established. A Washington State study found "little evidence that community notification prevented recidivism among adult sex offenders." (DOC 138; *see also* DOC 18, 53, 70.) A study from Iowa similarly found no significant difference in sex offense recidivism rates between sex offenders who were subject to that state's registration and community notification law and sex offenders who were not. Iowa Dep't of Human Rights, *The Iowa Sex Offender Registry and Recidivism* 19 (Dec. 2000) ("Sex-offense recidivism was low at 3.0 percent for the registry sample and 3.5 percent for the pre-registry sample"). Even law enforcement agencies are doubtful that community notification is worthwhile; a Department of Justice survey of law enforcement agencies in Wisconsin found that "only 41 percent believed it improved management and containment of sex offender behavior through greater visibility." *Wisconsin Study* at 6.[8]

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offense) and concluded that only 2.5% of released rapists were re-arrested for a new rape. BOJS, *Recidivism of Prisoners Released in 1994*, at 1 (June 2002). By contrast, 13.4% of released robbers were arrested for a new robbery and 22% of released assaulters were arrested for a new assault. (*Id.* at 9.) Similarly, the 1997 study cited by the Solicitor General noted that a follow-up of felony offenders placed on probation found that "rapists had a lower rate of re-arrest for a new felony and a lower rate of re-arrest for a violent felony than most categories of probationers with convictions for violence." BOJS, *Sex Offenses and Offenders*, at 25-26 (Feb. 1997). The findings the Solicitor General is distorting are those which merely state that a convicted rapist is more likely than someone previously convicted of some other crime (*e.g.*, bank robbery) to be arrested for rape. *But see Recidivism of Prisoners Released in 1994*, at 9-10 (noting that 78 rapists were rearrested for rape, while *1,639* non-rapists were rearrested for rape).

[8] Notification laws should not be expected to have a substantial impact on public safety because they focus on only a narrow slice of the

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In fact, there is a very real possibility that notification laws increase the risk that an offender will commit another crime. Stability and community support are important factors that serve to reduce the risk of reoffense. An isolated, unemployed and homeless sex offender clearly presents a greater risk than one who has the support of friends and family, is working full time, and has a place to live. (DOC 15-17, 49-50, 69.)[9] Further, the stress community notification causes offenders may trigger a new sex offense. *See* R. Karl Hanson & Andrew Harris, Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism*, 1998-1, at 2 ("recidivists showed increased anger and subjective distress just prior to re-offending"). Anecdotal examples of instances where community notification has purportedly prevented a new offense fail to take these considerations into account.

Many of the people who are perhaps most directly involved in attempting to reduce recidivism – the therapists

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overall problem of criminal sexual conduct. The particular type of sex offense these laws are designed to prevent – one committed by a prior sex offender whose history is not known to the victim or his/her parents – is relatively rare. Of the thousands of persons convicted of a sex offense each year, the vast majority do not have any prior sex offense conviction. *See Myths and Facts* ("[i]n 1994, it was estimated that 12% of imprisoned violent sex offenders had a prior conviction for rape or sexual assault"). Moreover, "[m]ost sexual assaults are committed by someone known to the victim or the victim's family." *Id.*; *see also Amicus* Br. of the State of Cal., *et al.* at 11 (approximately 46% of child molestations are committed by family members).

[9] *See also Wisconsin Study* at 10 (many offenders interviewed for study "drew from their own embittered experience with community notification to suggest that the tremendous pressure placed on sex offenders by the public and the media would drive many of them back to prison").

who treat sex offenders – believe that community notification is counterproductive. (DOC 14, 48, 67.) Treatment has been shown to help to reduce the risk that a sex offender will reoffend. (DOC 15, 50, 69.) Notification laws interfere with treatment both directly – the negative impact on the offender's prospects for employment leaves them less able to afford treatment – and indirectly – the belief that they will never be able to lead a normal life saps their motivation to pursue and complete therapy. (DOC 15-18, 53, 69; *see also* DOC 68 (therapist gives example of patient who was doing very well in therapy, but following community notification became suicidal and reoffended).)

Justice Brennan's observations in *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring), regarding a somewhat similar form of punishment – expatriation – are apt:

> instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights.

CONCLUSION

Based upon the foregoing, *amici curiae* respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* [1]

The Public Defender Service for the District of Columbia ("PDS") represents clients who will be affected by this case because of the close similarities between the retroactive 1999 D.C. Sex Offender Registration Act ("DC-SORA"), D.C. Code § 22-4001 *et seq.* (2001) and the Alaska statute under review. PDS clients have constitutional challenges pending in both the federal and local appellate courts of the District of Columbia. *See Doe v. Williams*, 167 F. Supp. 2d 45 (D.D.C. 2001); *W.M., et al. v. CSOSA*, D.C. Ct. App. Nos. 01-SP-683, *et al.*

STATEMENT

The Alaska Sex Offender Registration Act ("ASORA") is an "offense-based" Megan's law that applies retroactively to virtually every offense of a sexual nature in the Alaska Criminal Code. Emblematic of categorical schemes emerging around the country, Alaska's registration and community notification sanction is imposed, for life or for fifteen years, *solely* because of the offense of conviction and may not be avoided for any reason, including overwhelming proof of an offender's current *non*-dangerousness. "Offense-based" laws must be distinguished from the more narrowly drawn "offender-based" laws, which calibrate community notification, if any, to the former offender's assessed risk of recidivism, and limit release of the registry to those at risk. Contrary to Alaska and its *amici*'s suggestion that the differences among Megan's laws are irrelevant to constitutional analysis, excessive laws that fail to assure

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[1] All parties have consented in writing to this brief's submission. PDS attorneys are the sole authors. No entity external to PDS contributed money toward the brief.

accurate individualized determinations of dangerousness have fared poorly in court,[2] while the more narrowly drawn statutes have withstood review.[3]

Alaska law: ASORA requires sex offenders to register and repeatedly re-register with police, with criminal penalties for failure to do so, and authorizes unlimited public dissemination of their personal information and degraded legal status of "registered sex offenders." "Aggravated" sex offenders must register *at least quarterly for life*, which in the discretion of authorities may consist of reporting in-person at police stations, for the purpose of answering personal questions under oath, photographing and fingerprinting. Alaska Stat. § 12.63.010 (d)(2) (sworn statements musts be

[2] Decisions invalidating or enjoining offense-based laws on *ex post facto* grounds include: *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994); *Doe v. Attorney General*, 680 N.E.2d 97 (Mass. 1997); *State v. C.M.*, 746 So.2d 410 (Ala. Crim. App. 1999); *State v. Myers*, 923 P.2d 1024 (Kan. 1996). *But see Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2001). Decisions invalidating or enjoining Megan's laws on due process grounds include: *Doe v. Dep't of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001), *cert. granted*, No. 01-1231 (May 20, 2002); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Fullmer v. Michigan Dep't of St. Police*, 2002 WL 1164148 (E.D. Mich.); *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001); *Williams*, 167 F. Supp. 2d 45; *Doe v. Lee*, 132 F. Supp. 2d 57 (D. Conn. 2001); *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998); *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999); *Doe v. Attorney General*, 715 N.E.2d 37 (Mass. 1999); *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997); *In re C.M.*, 578 N.W.2d 391 (Minn. Ct. App. 1998); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); *Hawai'i v. Bani*, 36 P.3d 1255 (Haw. 2001); *Noble v. Board of Parole*, 964 P.2d 990 (Ore. 1998); *People v. David W.*, 733 N.E.2d 206 (N.Y. 2000); *State v. Pierce*, 794 A.2d 1123 (Conn. App. 2002).

[3] *See, e.g., Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Verniero*, 119 F.3d 1077; *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997).

submitted "in the manner required by the department").[4] Other "sex offenders" must register annually for fifteen years following their unconditional discharge from conviction. Alaska Stat. § 12.63.010 (d)(1). Such offenders include 18-year-olds convicted of consensual sexual contact with a 15-year-old, Alaska Stat. § 11.41.438 (a)(1), or of possession of pornography that they know depicts a 17-year-old. Alaska Stat. § 11.61.127 (a). Sex offenders must immediately report a change in address. Alaska Stat. § 12.63.010 (a). Noncompliance is punishable as a felony. Alaska Stat. §11.56.835.

The Act authorizes any means of public dissemination of a registrant's degraded legal status, along with his or her photograph, exact home and work address and other identifying information. Alaska Stat. § 18.65.087.[5] The Alaska Department of Public Safety maintains a central registry of registration information, which Alaska publishes on the worldwide web. Offenders are displayed by "name, color photograph, physical description, street address, employer address and conviction information, all under the banner 'Registered Sex Offender.'" *Doe v. Otte*, 259 F.3d 979, 984 (9th Cir. 2001).

The legislature has significantly amended the criminal law to integrate ASORA fully with Alaska criminal practice. The registration provisions are part of the "Code of Criminal Procedure." Alaska Stat. §§ 12.63.100, 12.63.010. Criminal

[4] Sex offenders must provide, "at a minimum," information regarding name, address, place of employment, date of birth, all sex or child kidnapping convictions, aliases, driver's license number, VIN for all motor vehicles to which the offender has access, any personal identifying features, anticipated changes of address and treatment for mental abnormality or personality disorder. Alaska Stat. § 12.63.010 (b) (1).

[5] The DC-SORA explicitly authorizes any manner of "active notification," which may include a policeman going door-to-door, warning registrants' neighbors. D.C. Code § 22-4011(b)(1)(A). ASORA similarly permits such practices.

Rule 11 requires the duty to register to be a written part of any plea agreement involving a sex offense. Criminal Rule 32(b) requires it to be a written part of the criminal judgment. The provisions of the Act apply *only* to persons otherwise subject to criminal sentences for sex crimes, i.e., those found guilty of sex crimes, who plead guilty or *nolo contendere*, or who are found guilty but mentally ill. They do not apply to those incompetent to stand trial or not criminally responsible by reason of insanity. Alaska Stat. § 12.63.100 (3).

Federal law: The Wetterling Act, 42 U.S.C. § 14071, conditions states' receipt of full federal funding under 42 U.S.C. § 3756 upon creation of conforming sex offender registration programs. § 4071(g)(2). Nonconforming states lose 10% of such funds. § 14071(f)(2). To conform, states must register persons convicted of "a criminal offense against a victim who is a minor" or "a sexually violent offense." § 14071(a)(1)(A). The Act requires no categorical public dissemination at all—only public dissemination of "relevant information" "necessary to protect the public concerning a specific person." § 14071(e).[6] The Act itself contains no retroactivity provision. The Attorney General's guidelines

[6] The United States incorrectly asserts that the Campus Sex Crimes Prevention Act requires States to categorically disseminate information regarding registrants affiliated with institutions of higher education. *See* U.S. Br. at 2, 6, 23. 42 U.S.C. § 14071(j) requires people otherwise obligated to register under state law to provide information about whether they attend or work at a higher education institution and states to enter such data in their existing systems and make it available to the law enforcement agency with jurisdiction over the institution. 20 U.S.C. § 1092 (f)(1)(I), part of a law regulating what information higher education institutions must publish, requires participating higher education institutions to publish a statement of where existing sex registrant information may be obtained. It is not addressed to the states and does *not* require them to alter their public dissemination schemes. The public "release of information" section of the Wetterling Act, 42 U.S.C. § 14071(e), has not been amended.

suggest limited retroactivity for convictions post-dating enactment of a statute, even if the offense occurred previously. 64 Fed. Reg. 572, 575, 581 (1999).

SUMMARY OF ARGUMENT

In response to the problem of sex crimes, and in part because of a belief that sex offenders' sentences are too lenient and many crimes go unreported, Alaska has initiated a pervasive and humiliating regime for unconditionally discharged former offenders that (1) restricts their liberty by permanently degrading their legal status and subjecting them to a lifetime of invasive government monitoring; (2) exposes them to infamy by labeling them "registered sex offenders" and broadcasting their faces and personal information on an Internet "registry" designed to warn the public of their presence in society until the day they die; and (3) imposes these disabilities based solely on a past conviction and not on an assessment of current dangerousness. Not coincidentally, these three characteristics—restrictions on liberty, stigma, and the attachment of those sanctions to a judgment of conviction—have been recognized time and again by this Court as the hallmarks of criminal punishment, *see, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000); *Breed v. Jones*, 421 U.S. 519, 529 (1975); *Mullaney v. Wilbur*, 421 U.S. 684, 697, 700 (1975); and our Constitution's explicit measure of the severity of punishment is the extent to which it makes a person "infamous." U.S. Const. amend. V. Regardless of its label (which we will demonstrate is itself penal), ASORA inflicts punishment under this Court's functional and historical analyses, *see, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Therefore, it may not be applied to offenses committed before its enactment.

The State's rejoinder to the vexing reality that things are generally what they appear to be is two-fold: The legislature has said otherwise; and the Act's purpose is preventive, to protect the community from future crime, a permissible goal

of civil regulation. Those answers are insufficient to sustain the sanction as a civil regulatory scheme in the face of overwhelming indicators of a forbidden retroactive punishment. First, this Court has always looked past legislative labels and analyzed a law *de novo* to determine whether it is civil or criminal. The State mistakes the "clearest proof" test for an insuperable obstacle to common sense. In reality, the only cases in which "clearest proof" has carried the day for the government have been those, totally unlike this one, when the legislature enacted a law that fit within a legal and historical tradition of civil legislation, and the claim was that an *apparently* civil law was in actuality punitive. *See Hudson v. United States*, 522 U.S. 93, 113-14 (1997) (Souter, J., concurring). But the registration, monitoring and social stigmatization of otherwise free American citizens based solely on a past conviction does not resemble any civil regulatory scheme in our history. To the contrary, such sanctions closely resemble colonial shaming punishments and modern-day supervised release. In cases where the sanction lacked a civil pedigree and instead had the suspicious earmarks of punishment, the Court has not even used the phrase "clearest proof." *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Whether the Court uses that phrase in this case is unimportant. The fundamental point is that simply through the expedient of labels, the legislature cannot change our historical, societal, and ultimately constitutional understandings of what is, or is not, punishment.

Protection of the community is a goal common both to the civil schemes approved in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *United States v. Salerno*, 481 U.S. 739 (1987), and penal laws prohibiting sex crimes. Standing alone, the articulation of such a goal, however genuine, does not determine which crime-preventive laws are civil and which are punitive. *See United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those

convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment"); 4 W. Blackstone, Commentaries*11-12 (one objective of criminal law is to "depriv[e] the party injuring of the power to do future mischief"). The schemes in *Salerno* and *Hendricks* passed constitutional muster only because they reserved their sanctions for demonstrably dangerous individuals pending trial on a serious matter or the demonstrably mentally ill and uncontrollably dangerous, bringing them within a historical tradition of permissible civil confinement and demonstrating that the legislature was focused on future dangerousness, rather than retribution. Because the Court's jurisprudence authorizing invasive civil regulation of the person for public safety is founded, at a minimum, on the provision of individualized, accurate and fair determinations of future dangerousness, Alaska's glaring omission of such safeguards can be explained only as punitive.

ARGUMENT

ASORA IMPERMISSIBLY INFLICTS RETROACTIVE PUNISHMENT

A. The *ex post facto* inquiry turns on objective factors, not subjective legislative motives

The Ex Post Facto Clause prohibits the states from enacting a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798). The purpose of the Ex Post Facto Clause is to give fair notice of what conduct the government will punish as a crime and the extent of the punishment it will inflict, and to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810); *Landgraf v. USI Films Products*, 511 U.S. 244, 266 (1994) (a legislature's "responsivity to political pressures" tempts it to target unpopular

groups for retribution). Like the Bill of Attainder Clause, the Ex Post Facto Clause also checks legislatures from invading judicial functions. *Carmell v. Texas*, 529 U.S. 513, 536 (2000).

Contrary to petitioner's suggestion that the Court limit its review to the question whether the Alaska legislature had a genuine motive to protect the public, Pet. Br. at 16, 21-22, this Court's review under the Ex Post Facto Clause is not limited to the near-impossible task of uncovering legislative "shams" and "charades." *See* Pet. Br. at 15, 22. Instead, the Court looks more broadly for "'the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated.'" *Lynce*, 519 U.S. at 441 (*quoting Weaver*, 450 U.S. at 30); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (Clause protects individuals when lawmakers "forget their duties" and "trample upon the rights and liberties of others"). The Constitution protects against all retroactive legislative punishments, not just maliciously inflicted ones. Moreover, this Court has cautioned against the practical and institutional futility of judicial attempts to inquire into legislative motives, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), and, in any event, "[i]t is well settled that realities rather than benign motives or non-criminal labels determine the relevance of constitutional policies." *In re Winship*, 397 U.S. 358, 365-66 (1970).[7] Consequently, petitioner is inaccurate in claiming that in the numerous cases where this Court has had to "re-label" putatively civil sanctions or proceedings as criminal it has done so by questioning the good

[7] Petitioner's related assertion, that *any* "sanction can be either civil or penal, depending on the legislature's intent," Pet. Br. at 16, is baseless. While true for some sanctions, e.g., monetary fines imposed in certain conditions, "[s]ome governmental exactions are so punitive they may be imposed only in a criminal proceeding." *Kurth Ranch*, 511 U.S. at 793 (O'Connor, J., dissenting).

faith of the legislature. *See* Pet. Br. at 16. The Court reclassified those laws because, functionally, they imposed criminal penalties, regardless of subjective legislative intent.[8]

Megan's laws, retroactively targeting a politically impotent group, implicate the core concerns of the Ex Post Facto Clause because such laws can become oppressive legislative "corrections" of sentences or plea bargains perceived to be too lenient. "Civil regulation" cannot be abused to indemnify the public against the consequences of "an improvident plea bargain on the criminal side." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring). Yet the United States relies heavily on this forbidden rationale to justify ASORA's draconian approach. U.S. Br. at 20 (categorical approach used because plea bargains understate the severity of the crime); *see also* Council of the District of Columbia, Committee on the Judiciary, Report on Bill 13-350, The Sex Offender Registration Act of 1999, at 6 (same). Legislative suspicion that the conviction—achieved through constitutionally prescribed judicial processes—insufficiently assures the degree of restriction on liberty desired by the legislature becomes the basis improperly to achieve a greater restriction through "civil regulation." This is a legislative usurpation of judicial and executive power and a subversion of the presumption of innocence, *see Carmell*, 529 U.S. at 532: A lesser conviction,

[8] *See, e.g., Lynce*, 519 U.S. at 442 (eschewing arguments that "place undue emphasis on the legislature's subjective intent"; invalidating statute retroactively canceling early release prison credits although legislative intent centered solely around remedial purpose of administering prison overcrowding); *Kurth Ranch*, 511 U.S. 767 (re-labeling grossly excessive tax levied solely on criminal activity as punitive notwithstanding expressed revenue-generating purpose); *In re Gault*, 387 U.S. 1, 50 (1967) (refusing to "disregard substance" and defer to "the 'civil' label-of-convenience . . . attached to juvenile proceedings"); *Breed*, 421 U.S. at 528-29 ("a gap between the originally benign conception of the [juvenile] system and its realities" warrants application of the Double Jeopardy Clause).

obtained because the evidence warranted no greater conviction, is "civilly" augmented by the legislature outside the constraints of the Bill of Rights.

It is not disputed that ASORA imposes a retroactive sanction. The question is whether that sanction is "punitive" in the constitutional sense. To determine whether a statute imposes punishment, the Court first construes the statute. *Mendoza-Martinez*, 372 U.S. at 168; *United States v. Ursery*, 518 U.S. 267, 288 (1996). If the legislature intended the sanction to be punitive, then it is. But the opposite is not true. The Constitution requires that a putatively civil act be treated as criminal if its objective purpose or effect is punitive under the functional and historical criteria traditionally used by this Court, namely: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only after a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168. These factors are not exclusive or mechanistically applied, but usefully identify characteristics historically and legally signifying punishment. *See Hudson*, 522 U.S. at 115 (Breyer, J., concurring).

Where a "'civil' label-of-convenience," *Breed*, 421 U.S. at 529, has masked a penal law, the Court has discarded it.[9]

[9] *See, e.g., Cummings*, 71 U.S. 277; *In re Garland*, 71 U.S. (4 Wall.) 333 (1867); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. La Franca*, 282 U.S. 568 (1931); *United States v. Constantine*, 296 U.S. 287 (1935); *United States v. Lovett*, 328 U.S. 303 (1946); *Weaver*, 450 U.S. 24; *United States v. Halper*, 490 U.S. 435 (1989); *Kurth Ranch*, 511 U.S. 767; *Lynce*, 519 U.S. 433.

"The Constitution deals in substance, not shadows.. . . If [the *ex post facto*] inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings*, 71 U.S. at 325; *Weaver*, 450 U.S. at 31 ("effect, not . . . form" determines whether a law is punitive).[10] However, when the legislature affixes a civil label to a statute that fits within a well-established tradition of civil legislation, the opponent of the law must point to the "clearest proof" that the apparently civil law is really punitive.[11] That test, which, in any event, is amply satisfied here, can hardly apply to Megan's laws, a totally novel species of legislation. *See Hudson*, 522 U.S. at 113 (Souter, J., concurring) ("[W]hat may be clear enough to be 'clearest' is necessarily dependent on context. . . . I read the requisite "clearest proof" of criminal character, then, to be a function of the countervailing indications of civil nature."); *id.* at 115 (Breyer, J., concurring) ("clearest proof" phraseology "misleading[ly]" describes the Court's reviewing function).

[10] *See also Kurth Ranch*, 511 U.S. at 793 (O'Connor, J., dissenting) ("[T]he Constitution constrains the State's ability to denominate proceedings as civil and so dispense with the criminal procedure protections provided by the Bill of Rights."); *Lynce*, 519 U.S. at 442; *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

[11] *See Hendricks*, 521 U.S. at 361 ("civil commitment procedure" fell well within the tradition of confining the mentally ill and dangerous for treatment); *Ursery*, 518 U.S. at 274 (*in rem* civil forfeiture within civil tradition dating to "the earliest years of this Nation"); *Fleming*, 363 U.S. at 617 (claim that civil label was pre-textual must fail where there were no objective manifestations of punitive intent and legislature has traditional prerogative to terminate benefits for any rational reason).

B. ASORA is penal in form as well as function because it is an integral part of the criminal process

The Court need not reach the "purpose or effect" inquiry because, as a basic matter of "statutory construction," *see Hendricks*, 521 U.S. at 361, the Act is penal.[12] The legislature did not label the registration requirement civil. Registration is codified in the criminal code, made a mandatory part of the plea and sentence, imposed by criminal court judges, at the behest of prosecutors, and enforced by the police.[13] These familiar penal characteristics are reinforced by the fact that the registration and notification sanctions apply *only* to those convicted of a crime, do *not* apply to those found incompetent or not criminally responsible, and may not be avoided for any reason. While petitioner argues that ASORA's preamble, asserting that the Act's purpose is to "protect the public," is a litmus test of its civil character, in actuality, the preamble closely tracks the Alaska Constitution's requirement that

[12] Constrained by its previous decision in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), on rehearing, the Court of Appeals held that the expressed legislative intent of the ASORA was non-punitive. *Otte*, 259 F.3d at 986. This Court is not similarly constrained and should reach the opposite conclusion. The Alaska Supreme Court has not construed the statute, and, in any event, this Court determines *de novo* the question of legislative intent in *ex post facto* analysis. *See Hendricks*, 521 U.S. at 365.

[13] *Compare Hendricks*, 521 U.S. at 461 (label of "civil commitment procedure" and placement of statute in probate code evidenced intent to create a civil proceeding); *Hudson*, 522 U.S. at 94, 103 (penalties designated "civil"; "we think it significant that the authority to issue debarment orders is conferred upon 'appropriate Federal banking agenc[ies]'" which are "administrative agencies"); *Allen v. Illinois*, 478 U.S. 364, 368 (1986) (act states proceedings "shall be civil in nature"); *Ursery*, 518 U.S. at 289 (creation of "distinctly civil procedures" for *in rem* action labeled "civil forfeiture" consistent with civil pedigree of such proceedings); *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) (administrative proceedings in which tax is assessed evidenced civil character).

"[p]enal administration shall be based. . . upon the need for protecting the public." Alaska Const. Art. 1, § 12. By contrast, offender-based laws are more readily classified as civil because they contain provisions guaranteeing extra-penal administrative and judicial proceedings to fairly determine current dangerousness. *See, e.g., Verniero*, 119 F.3d at 1111 (requiring proof of dangerousness by clear and convincing evidence). ASORA's objective features are powerful indicators of punitive legislative intent and are independently important in the functional analysis because they will lead ordinary people to understand the sanction as a punishment.

C. ASORA imposes disabilities and restraints historically regarded as punishment

The historical pedigree of a particular type of sanction has been of crucial importance in the Court's *ex post facto* jurisprudence.[14] "[A] page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 265 U.S. 345, 349 (1921), here, as elsewhere, because history both reveals how the Framers would have viewed the sanction at the time the Clause was adopted and best indicates how society will continue to view it through the lens of our traditions and understandings as a democratic society. Historically and today, ASORA's regime of official monitoring and stigma based solely on a judgment of conviction is the paradigm of punishment.

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact," and punishment is characterized by both "outrage on the feelings

[14] *See, e.g., Hendricks*, 521 U.S. at 371 (law "within th[e] pattern and tradition of civil confinement") (Kennedy, J., concurring); *Helvering*, 303 U.S. at 398 (forfeiture and fines deemed civil "since the original revenue law of 1789"); *Ursery*, 518 U.S. at 274 (*in rem* forfeitures deemed civil "[s]ince the earliest years of this Nation").

as well as restraints on the person." *Cummings*, 71 U.S. at 320. Thus, Alaska's narrow view of "disability or restraint," equating that term with incarceration, Pet. Br. at 37-38, is inaccurate and has been expressly rejected by this Court. *Cummings*, 71 U.S. at 322 (rejecting government argument that punishment is limited to "the deprivation of life, liberty, or property"). Incarceration is obviously not the touchstone of punishment, as probation is punishment, *Korematsu v. United States*, 319 U.S. 432, 435 (1943), while imprisonment may be regulatory. *Salerno*, 481 U.S. 739. To the Framers, the public humiliation inflicted by ASORA would have seemed a much more familiar form of punishment than incarceration, whose prevalence has exponentially increased only in modern times. *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich. L. Rev. 1179, 1180 (1981-82).

1. Registration is an affirmative restriction on liberty analogous to other forms of punishment, like probation or parole.[15] To remain at liberty, registrants must perpetually submit to official monitoring by providing a wide range of personal information in sworn statements, including current home and work address, a description of personal identifying features, motor vehicle information and a statement regarding mental health treatment. They must submit to periodic fingerprinting and photographing. Registrants may not shave their beards, color their hair, borrow a car, or visit a psychiatrist without reporting such personal matters to the government. Life registrants must re-register *at least* quarterly; others must do so annually. The Act gives authorities

[15] While a parolee is required to submit to conditions besides reporting, he also receives a benefit from being on parole, shortening his prison sentence and getting help reintegrating into society. *See Morrisey v. Brewer*, 408 U.S. 471, 477 (1972). Registrants are more burdened than parolees because registration does not shorten their prison sentence, and notification is intended to exclude them from, not reintegrate them into, the community.

discretion to force registrants to report in-person, by mail, or even by having a police officer arrive unannounced at their place of business. This awesome governmental power is bestowed through the statutory command that registrants submit their sworn statements "in the manner required by the department."[16]

The requirement of submission to government surveillance deviates sharply from our civil liberty norm, a hallmark of which is that Americans do not have to "produce papers" or submit to suspicionless scrutiny at the whim of state officials. *Gomez v. Turner*, 672 F.2d 134, 143-44 n. 18 (D.C. Cir.1982) ("That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others"); *Brown v. Texas*, 443 U.S. 47 (1979) (police cannot require person to identify himself absent reasonable suspicion); *Terry v. Ohio*,

[16] Alaska faults the court below for relying on its attorney's representation at oral argument that the Act requires in-person quarterly re-registration, when, in fact, the Act does not have that specific requirement, but instead gives the government unfettered discretion to require *any form* of re-registration, *at least*, quarterly. Thus, while the State may choose a less onerous registration method than outlined in the Ninth Circuit opinion, it may also choose a *more* onerous method. Since an *ex post facto* challenge must be addressed to a statute on its face, not as applied, *Seling v. Young*, 531 U.S. 250, 262 (2001) (analysis "cannot be altered based merely on the vagaries in the implementation of the authorizing statute"), existing practice, which may change at a moment's notice, is immaterial. The D.C. statute is similar, permitting on demand verification, photographing, fingerprinting, or "meet[ing] with responsible officers and officials." D.C. Code §§ 22-4007—4009, 4014. In mid-litigation, the District's Offender Supervision Agency changed its policy from requiring in-person verification to permitting mail verification. *See also Doe v. Pataki*, 120 F.3d at 1285 ("we recognize that the duty to register in person every 90 days for a minimum of ten years is onerous"). Moreover, even if the Act were limited to sworn statement submitted by mail, it would still impose an invasive legal duty that does not otherwise exist.

392 U.S. 1, 34 (1968) (White, J. concurring) (refusal to cooperate with suspicionless inquiry can furnish no basis for arrest); *Weems v. United States*, 217 U.S. 349, 366 (1910) (punishment of government surveillance is a "perpetual limitation [on] liberty").

As former Massachusetts Justice Fried put it:

> [T]o keep the concept of regulation in its place, it may be said that, while activities, professions, or relationships may be regulated, we do not have a general regime regulating adult competent persons as such . . . . Persons are left to choose freely and if they make the wrong choices they are subject to retrospective condemnation and punishment. This is not merely a conceptual difference. It is a profound expression of our Constitution's conception of human nature and of the relation of individuals to the State.
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> * * *
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> To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Doe v. Attorney General, 686 N.E.2d at 1015-16 (concurring opinion).[17]

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[17] This Court has never upheld a "felon registration" law as a proper civil regulation, as that question was not presented in *Lambert v. California*, 355 U.S. 225 (1957). Although some existed in the early part of the twentieth century, such laws were widely criticized. *See generally* Note, *Knowledge of the Law Required for Conviction Under Criminal Registration Ordinance*, 56 U. Mich. L. Rev. 1008, 1011 (1958) (enforcement marked by "[a]busive and discriminatory practices"); Note, *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U. Pa. L. Rev. 60, 82-94 (1954) (laws used as a pretext for "rounding up the usual suspects"). Many have been repealed. *See, e.g.*, 18 U.S.C. § 1407 (repealed 1970) (requiring drug addicts to register when crossing border); N.J. Stat. Ann. § 2A:169A-2 (repealed 1971) (felon Registration). Those laws still in existence are nothing like ASORA. They require one-time registration only, sometimes imposing a further reporting duty only in the event of a change in address, contain provisions prohibiting public disclosure and frequently exempt felons whose civil rights have been restored. *See, e.g.*, Ala. Code § 13A-11-181—185; Fla. Stat. Ch. 775.13; Miss. Code Ann. § 97-35-27; Nev. Rev. Stat. 179C.100-170. Thus, while imposing a modest restriction on liberty, they do not expose registrants to infamy.

Submission to official personal monitoring is fundamentally unlike the registration of businesses, political candidates, and other participants in regulated activities. *See* Pet. Br. at 40 n.26. Such registration is not a sanction at all, but a reasonable condition attaching to voluntary participation in regulated activities. Moreover, applying for a license for a business or profession is not stigmatizing. Similarly, sex offender registration cannot be compared with filing taxes or a census form, civic duties, grounded in the Constitution, that apply to the entire citizenry. *See Dep't of Pub. Safety*, 271 F.3d at 59.

2. Registration and public notification officially stigmatize registrants in a manner historically regarded as punishment in two significant ways. First, "registered sex offender" status and publication of the sex offender registry officially enlarge the stigma attached to the conviction. Since stigma stemming from criminal conviction is a hallmark of punishment, enlargement of the stigma signifies an enlargement of the punishment. *See In re Medley*, 134 U.S. 160, 170-71 (1890). Second, forcing offenders to wear the name of their crime—the very function of public notification—is a State infliction of public disgrace that has historically been punishment and only punishment.

The sex offender registry fundamentally differs from the publicly available judicial record of conviction. Open criminal records and trials reflect our common law tradition and the constitutional mandate of public access to criminal

proceedings and protect the accused's as well as the public's rights. The sex offender registry is not designed to facilitate access to judicial records of historical events adjudicated in criminal cases. If it were, there would be no need for a rigorous regime of personal registration. Instead, dissemination of the registry communicates the State's perpetual, not past, judgment of condemnation and registrants' current, not historical, information.

The public is told that the former offender is a "registered sex offender," i.e., a state-certified menace.[18] This is not dissemination of a public record. "This is a determination of status." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 175 (1951) (Douglas, J., concurring) (Attorney General's classification of organizations as communist or subversive is a stigmatizing alteration of legal status); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (Attorney General's designation of "terrorist" organizations alters legal status); *Doe v. Attorney General*, 686 N.E.2d at 1013 ("[S]tatutory branding . . . implicitly announces that, in the eyes of the State, the plaintiff presents a risk of committing a sex offense.").

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[18] Lower courts have overwhelmingly held that publication of the registry is stigmatizing because it communicates the State's current assessment of a likelihood of continuing criminality, not merely a past record. *See, e.g., Doe v. Dep't of Pub. Safety*, 271 F.3d at 49; *Fullmer v. Michigan Dep't of St. Police*, 2002 WL 1164148 (E.D. Mich.); *Williams*, 167 F.Supp. 2d at 51; *Doe v. Lee*, 132 F. Supp. 2d 57, 64 (D. Conn. 2001); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998); *Roe v. Farwell*, 999 F. Supp. at 195-96; *W.P. v. Poritz*, 931 F.Supp. 1199, 1219 ((D.N.J. 1996); *Bani*, 36 P.3d at 1264; *Commonwealth v. Williams*, 733 A.2d 593, 605-06 (Pa. 1999); *Doe v. Attorney General*, 715 N.E. 2d 37, 43 (Mass. 1999); *Doe v. Poritz*, 662 A.2d 367, 419-20 (N.J. 1995); *People v. David W.*, 733 N.E.2d 206, 210-11 (N.Y. 2000); *Noble v. Board of Parole*, 964 P.2d 990, 995-96 (Ore. 1998). *Cf. Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997); *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994).

The State intensifies its assault on reputation and dignity by broadcasting its condemnatory labeling of registrants together with information that pinpoints registrants' identity and location at all times. This unprecedented governmental packaging and publication of stigmatizing legal status and personal information devastates registrants' reputation, privacy and personal security. Exposure of former offenders to constant public scrutiny, harassment and potential violence denudes registrants of a basic human dignity, "the right to be let alone," which Justice Brandeis characterized as the "right most valued by civilized men.'" *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). While such treatment of citizens raises a serious question of invasion of privacy under the Due Process Clause,[19] the salient point here is that placing free American citizens in a government-constructed fishbowl is offensive to American sensibilities, and therefore has no regulatory pedigree, but *is* consistent with the dangers, indignity and diminution of privacy associated with prison life or life on conditional release. *Cf. United States v. Knights*, 534 U.S. 112 (2001) (probationer has diminished expectation of privacy).

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[19] *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (Clause protects "the individual interest in avoiding disclosure of personal matters"); *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999); *A.A. v. New Jersey*, 176 F. Supp. 2d at 300 (enjoining State, on federal constitutional privacy grounds, from placing registrants' home addresses on the Internet for indiscriminate public access); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998) (police officers had constitutional privacy interest in the nondisclosure of their home addresses as chance of retaliation and physical violence by private citizens was substantial). "Most courts considering the question . . . agree that privacy of personal matters is a protected interest." *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (collecting cases); *Cf. United States Dep't of Defense v. FLRA*, 510 U.S. 487, 501 (1994) (FOIA does not permit disclosure of home addresses; "it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant").

Aggressive public notification of the offender's crime has historically been used as punishment. England and Colonial America often dealt with crime through a variety of "humiliatory punishments," *Hirsch*, *supra*, at 1225, such as the scarlet letters of literary fame. These historical antecedents are critical because they were intimately familiar to the Framers, whose very conception of the severity of punishment was whether it exposed the offender to "infam[y]." U.S. Const. amend. V. While in modern times, imprisonment in the penitentiary has replaced capital punishment for most formerly capital crimes and entirely replaced infamous corporal punishments, and has therefore become the typical measure of infamy for constitutional purposes, *see Mackin v. United States*, 117 U.S. 348, 351 (1886); *United States v. Moreland*, 258 U.S. 433, 448 (1922) (Brandeis, J., dissenting), the Alaska legislature's return to the Constitution's original conception of infamous punishment through a public notification scheme that results in "public disgrace" and "exposure to infamy," "render[ing the offender's] loss of reputation permanent," *id.*, cannot escape its punitive roots.

Plastering registrants' faces on the Internet under the label "registered sex offender" (in the District of Columbia, the label is imposed on the offender's chest, *see* http://www.mpdc.dc.gov/serv/sor/sor.shtm) is functionally indistinguishable from forcing them to wear a scarlet letter, an infamous colonial punishment etched in our national conscience by Hawthorne's famous novel. "This custom of labeling a criminal with words or initials expositive of his crime or his political or religious offense, is neither American nor Puritan in invention and operation, but is so ancient that the knowledge of its beginning is lost." Alice M. Earle, *Curious Punishments of Bygone Days* 94 (1896) (Applewood reprint 1995). *See also* Raphael Semmes, *Crime and Punishment in Early Maryland* 32 (1938) (offenders stood in the pillory wearing signs listing their crimes); Edwin Powers, *Crime and Punishment in Early Massachusetts* 198-201 (1966)

(describing signs and symbols signifying criminality); *Barenblatt v. United States*, 360 U.S. 109, 153 (1959) (Black, J., dissenting) ("punishment by humiliation and public shame" is "one of the oldest forms of governmental punishment known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it"); *Ex Parte Wilson*, 114 U.S. 417, 427 (1885).

While many colonial humiliatory punishments involved infliction of physical pain, many did not. Their essence was public disgrace: "[T]he authorities often dispensed with the punishment's physical component entirely: Many humiliated offenders were required simply to stand in public with signs cataloguing their offenses, a punishment that relied solely on mental anguish for its rehabilitative and deterrent effect." Hirsch, *supra*, at 1226. For less serious crime, labeling punishments were temporary, permitting eventual reintegration. More serious offenders would be labeled permanently so as to suffer "permanent stigmas, which in effect cast the person out of the community, though they did not involve physical banishment." Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1913 (1991). Just like ASORA's avowed purpose, an important purpose of labeling punishments, especially when long-lasting or permanent, was to warn the community of the offender's presence for the sake of community protection. "Branding and letter-wearing were ways of marking an offender publicly—like sitting in the stocks, but far more permanently. The message was that *this* offender was not likely to mend his ways; disgrace would and should last until death." Lawrence M. Friedman, *Crime and Punishment in American History* 40 (1993); Hirsch, *supra*, at 1228 (branding and mutilation fixed "an indelible 'mark of infamy'"—"their specific motive was to disable the offender from ever harming the community again").

Nor is our experience of ostracizing punishments limited to remote epochs. Judges are spearheading a virtual renaissance

of disgracing punishments, frankly labeled as such. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean*?, 63 U. Chi. L. Rev. 591, 631-35 (1996) (citing newspaper accounts of judges ordering probationers to post signs, declaring, for example, "I am a convicted child molester," or shirts saying "I am on felony probation for theft" or "I am a thief"); Massaro, *supra*, at 1884-90; Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 Duke L.J. 1357. Judges impose such sanctions as punishments because they consider them punishments, the community perceives them as punishments and because they serve the goals of punishment—retribution, deterrence and incapacitation through public warning and shunning. *See State v. Bateman*, 771 P.2d 314 (Ore. App. 1989) (probationer required to post signs that read "Dangerous Sex Offender—No Children Allowed"); *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996) (sex offender sign in front yard "warning all children"); *People v. Hackler*, 16 Cal. Rptr. 2d 681, 686 (1993) (judge told defendant he would "become a Hester Prin [sic] for one year") *Goldschmitt v. State*, 490 So.2d 123, 125 (Fla. Dist. Ct. App. 1986) (forcing probationer to display bumper sticker announcing D.U.I. conviction appropriately "inflicts disgrace and contumely in a dramatic and spectacular manner").

Professor Kahan predicts that the emerging humiliatory punishments—such as "stigmatizing publicity" (official publication of names of offenders and their crimes in newspapers and billboards) and "literal stigmatizing" (inviting ridicule by forcing offenders to wear symbols expositive of their crimes)—are likely to succeed politically because the public will perceive them as richly expressive of condemnation, where other incarceration alternatives, such as fines and community service, have failed because they convey condemnation only ambivalently. Kahan, *supra*, at 631-35, 649-53. These punishments "magnify the humiliation inherent in conviction by communicating the offender's status to a

wider audience." *Id.* at 631-32. ASORA's sanction combines the humiliating features of magnifying stigma through wide publication and evoking ridicule through labeling offenders' images with their crimes and signifies more condemnation than these recognized punishments because the status it conveys is not just that of convict, but of "registered sex offender," a convict singled out for perpetual governmental monitoring, which, because of the value of liberty and privacy in our society, is itself degrading to endure and to have others know about.

Alaska's disavowal of the lineage of its public notification scheme is unpersuasive. *See* Pet. Br. at 35-36. As demonstrated, the essence of disgracing punishments was not physical pain, but exposure to infamy and loss of reputation, otherwise offenders would have been punished privately and purely disgracing punishments, like letter-wearing, would not have been inflicted. *See* Kahan, *supra*, at 611 ("For early Americans, shame was an even more salient ingredient of corporal punishment than was physical pain."). Indeed, the decline of corporal punishment is traced to its inefficacy as a shaming device as communities grew larger, diluting the strength of public disgrace—a problem now solved by superior means of communication, like the Internet. *Id.* at 642. The State's claim that public notification does not involve the former offender's "physical participation," is difficult to grasp. Pet. Br. at 36. Registrants are required to "physically" present themselves to provide the information and sit for the photographs used to degrade them. More importantly, the cyber-"confrontation," *id.*, of the humiliated registrant and his community is the most effective way to deliver shaming and ostracism today, *see Reno v. ACLU*, 521 U.S. 844, 870 (1997) (the Internet projects "a voice that resonates farther than it could from any soapbox") and has indisputably led to vigilantism and harassment. *See Amicus* Br. of N.J. Public Defender. Wanted posters and warnings about escaped prisoners are hardly the better analogy, Pet. Br.

at 36, since registrants are not in need of capturing. The warning the government disseminates by publishing the registry is that former offenders are to be ostracized *because of their criminal conviction alone*, precisely the purpose of colonial shaming punishments, which marked the offender with his crime so as to "disable the offender from ever harming the community again." *Hirsch*, *supra*, at 1226; *see also Verniero*, 119 F.3d at 1114-19 (Becker, J., dissenting).

Our historical understanding of punishment as a stigmatizing restriction on liberty imposed solely as a consequence of criminal conviction is ubiquitously recognized in the Court's decisions requiring that various findings be subjected to the rigors of the Bill of Rights when they subject one to increased punishment. *See Apprendi*, 530 U.S. at 484 (facts that increase "the loss of liberty and the stigma attaching to the offense" must be tried to the jury); *Winship*, 397 U.S. at 363 (reasonable doubt standard required because the accused faces the possibility of loss of liberty and "the certainty that he would be stigmatized by the conviction"); *Breed*, 421 U.S. at 529 (double jeopardy applies in juvenile proceedings because stigma and loss of liberty attach to guilt finding); *Mullaney*, 421 U.S. at 697, 700 (criminal law protects "the defendant's critical interests in liberty and reputation"; equating increase in stigma with increase in punishment).

3. In *Hendricks*, the Court approved, against an *ex post facto* and substantive due process challenge, a civil commitment scheme that inflicted both a severe restraint on liberty and stigma, much like criminal punishment. But the critical feature in *Hendricks* was that the sanction did not attach because of past conviction. The Court repeatedly underscored that the sanction was "limited . . . to a small segment of particularly dangerous individuals" and past crime was "used solely for evidentiary purposes," in a civil commitment trial addressed to *current* dangerousness and mental abnormality. 521 U.S. at 362, 368-71. Those committed had

to be treated, if-treatable, and freed from governmental regulation when not dangerous or not mentally ill. *Id.* at 368-69; *Foucha v. Louisiana*, 504 U.S. 71 (1992). The Court painstakingly reviewed the Kansas statute and approved it only because its strict substantive criteria and procedural protections brought it within a historical and legal tradition of confining the mentally ill and dangerous. *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring) (protections bring statute "within th[e] pattern and tradition of civil confinement"). In *Kansas v. Crane*, 534 U.S. ___, 122 S. Ct. 867 (2002), the Court further limited sexual psychopath commitment by more tightly tethering it to the traditional *parens patriae* model of civil commitment of the dangerously mentally deranged: The State must prove a link between the alleged mental abnormality and future dangerousness in the form of a substantial inability to control behavior. The Court underscored that any lesser requirement would permit "civil" commitment to displace criminal law. *Id.* at 870.

ASORA is as far flung from the tight regime of *Hendricks-Crane* as it can be. Not only is there no requirement that registrants be mentally abnormal or lack impulse control, they need not be dangerous. They receive no treatment and cannot shorten their registration and notification period by even one day for any reason, including conclusive proof of rehabilitation or total physical incapacitation. Because the Act does not require current findings relative to the purported remedial goal of averting future danger, the sanction is retributive and backward-looking.

Acceptance of the assertion that the legislature could, consistent with a purpose to regulate for future dangerousness, eliminate an inquiry into future dangerousness because such predictions are "unreliable" and "tentative at best," U.S. Br. at 22, "would immediately call into question those other contexts in which predictions of future behavior are constantly made," *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983), such as civil commitment, preventive detention and

imposition of the death penalty. It is untenable that prediction of future dangerousness is reliable enough to support indefinite confinement or a death sentence, but not decisions about public notification of sex offenders who have completed their sentences and paid their debt to society.

The cases where the Court has permitted a civil "tacking on" of a sanction based solely on past criminal conviction are quite distinct from the situation here. A one-time civil monetary sanction may be imposed solely as a consequence of criminal conviction, in addition to criminal penalties for the same conduct. *Hudson*, 522 U.S. at 113-14. Prior convictions may also disqualify ex-felons from certain *activities* to which that conviction is relevant, such as a particular profession or owning a gun. *See, e.g., id.* (debarment from banking profession based on fraud). In both instances, the Court has relied on the long civil pedigree of such sanctions, a factor entirely lacking here. *See Helvering*, 303 U.S. at 399. The Court has also recognized the financially remedial function of civil fines, *id.* at 401, and the legislature's broad authority to regulate professions, licenses and the like. In *Flemming*, the Court explained that "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." 363 U.S. at 613-14.[20]

ASORA does not seek to exclude ex-offenders from a profession, licensed activity or like privilege, to which their conviction may be relevant. It seeks to exclude them from living a normal, dignified, private life, which is the birthright

[20] *Compare Hawker v. New York*, 170 U.S. 189 (1898) (excluding felons from medical profession was regulatory) *with Cummings*, 71 U.S. at 320 (sanction designed "in order to reach the person, not the calling," is punitive).

of every American citizen not civilly or criminally committed to the State. "'There are places in the world where failure is final. America is still the country of second chances.'" Amy Franklin, *Cheney to Speak at Michigan State Commencement*, Assoc. Press, May 3, 2002, at 1 (quoting the Vice President). The State may, of course, deny a "second chance" by imposing severe criminal penalties, but it must do so within the constraints of the Ex Post Facto Clause. Neither the State nor its *amici* offer a principled basis for confining a humiliating regime of registration and notification like ASORA to sex offenses. Offense-based laws like Alaska's and D.C.'s broadly encompass nonviolent crimes and petty offenses not deemed serious enough to warrant a jury trial (the non-jury-demanderable offense of "misdemeanor sexual abuse," D.C. Code § 22-3006, when committed against a person under 18 is subject to ten-year registration and notification). Moreover, as the United States admits and the record of this case proves, many people who commit serious sex crimes respond to treatment and are redeemable. *See* U.S. Br. in *McKune v. Lile*, No. 00-1187 at 3 & n.2, 21, 23. Neither the categorical seriousness of the crime, nor the categorical (and seriously overstated, *see Amicus* Br. of Massachusetts Committee of Public Counsel Services) likelihood of recidivism distinguish ASORA's offenses from the non-sexual offenses now exempted, but which, may, in the future become the target of public anger. Instead of a nation of second chances, America would become a nation of state-sponsored finger-pointing and recrimination long after the offender's debt to society assessed by the legislature, juries and the courts has been retired.

D. ASORA has the traits of a penal law under the remaining functional factors

The remainder of the functional analysis supports the conclusion that ASORA is punitive. As discussed, the State's extreme reliance on the law's preventive purpose is misplaced

because that precise purpose is shared by the criminal law. Alaska Const. Art. 1, § 12; *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) ("I would place particular importance upon those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose"); *Foucha*, 504 U.S. at 99 (Kennedy, J., dissenting) ("isolation of the dangerous has always been considered an important function of the criminal law").

More significant is the sanction's gross disproportionality to a preventive purpose. A legislature's failure to use "alternative and less harsh methods" to achieve a purported regulatory objective tends to show that the legislature's "purpose . . . was to punish." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). Alaska's failure to focus its regime on future dangerousness in any meaningful way is unacceptable in this context. As demonstrated, mere rational relationship between means and ends may be constitutionally acceptable for a narrow sanction, like occupational debarment based on a conviction, but not for a sanction that perpetually exposes one to infamy and restricts liberty. This Court's *ex post facto* jurisprudence has consistently examined proportionality of means and ends and in the arena of invasive regulation of the person for public safety, only a narrowly tailored approach has ever been found to be consistent with our historical and legal models permitting such extraordinary state action. *See Doe v. Attorney General*, 686 N.E.2d at 1014-16 (Fried, J., concurring) (under the *Hendricks* model, Megan's laws are justifiable only when "narrowly tailored to a grave danger"). We therefore agree with the Court of Appeals that ASORA's excessiveness speaks volumes about its punitiveness and has been the decisive factor in most relevant Court of Appeals decisions.[21]

[21] *See Doe v. Pataki*, 120 F.3d at 1277-78 ("[f]irst and foremost, the extent of notification is carefully calibrated to, and depends solely upon, the offender's perceived risk of re-offense"); *Roe v. Office of Adult Probation*, 125 F.3d at 53-54 (notification "depends solely upon the offender's perceived risk of re-offense, and not upon the fact of his prior conviction," based on "individualized clinical assessment by a treatment provider"; notification strictly limited "to persons who may be endangered . . . due to the offender's activities or proximity"); *E.B v. Verniero*, 119 F.3d at 1097-98 (notification "scheme is a measured response . . . that does not subject all registrants to dissemination of information beyond law enforcement"; and individualized "risk assessment" "based on objective criteria" "is utilized to determine the maximum scope of the notification"); *Russell v. Gregoire*, 124 F.3d at 1090-91 ("The law contains careful safeguards to prevent notification in cases where it is not warranted and to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect. . . . A law designed to punish an offender would not contain these strict limitations on notification"); *Cutshall v. Sundquist*, 193 F.3d at 474 ("the authority of law enforcement agencies to disclose registry information is limited to situations in which disclosure is necessary to protect the public"). *See also Myers*, 923 P.2d at 1041 (excessive Megan's law is punitive); *Doe v. Attorney General*, 680 N.E.2d at 99 (same).

Mandatory application of the sanction solely based on a criminal conviction further supports the conclusion that ASORA simply piles on additional punishment to a pre-existing conviction. *See Kurth Ranch*, 511 U.S. at 781; *Lipke*, 259 U.S. at 561-62; *Hendricks*, 521 U.S. at 362. The scienter inquiry determines whether the conduct to which the sanction attaches is of the sort normally considered a crime because scienter has been an important hallmark of criminal liability. *See Liparota v. United States*, 471 U.S. 419, 426 (1985). In this case, there is no need for a scienter inquiry because ASORA's sanction applies not only to behavior that is a crime, it applies only when that behavior has been reduced to a criminal conviction. *Compare Child Labor Tax Case*, 259 U.S. 20, 37 (1922) (where no existing federal crime prohibited child labor, Court determined that federal tax is in actuality a criminal punishment because it was imposed only upon a finding of scienter). Finally, as demonstrated, ASORA's sanctions serve the traditional aims

of punishment—retribution and deterrence—by imposing a foreboding sanction based solely on the blameworthiness of past criminal conduct, rather than present dangerousness.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

GLENN G. GODFREY AND BRUCE M. BOTELHO,
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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF SUPPORTING RESPONDENTS IN EVIDENCE THAT INTERNET SEX OFFENDER REGISTRATION IS EXCESSIVE PUNISHMENT THAT STATISTICALLY REDUCES PUBLIC SAFETY

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Pursuant to Supreme Court Rule 37(3)(a), it is disclosed that consent was not granted by the parties to file this *amicus curiae* brief. permission was refused by John G. Roberts, Jr.

IN THE
SUPREME COURT OF THE UNITED STATES

Glenn G. Godrey and Bruce M. Botelho, Petitioners, v. John Doe I, et al., Respondents,	MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF No. 01-729

Amicus curiae, Richard Jones, having requested consent from the parties to this action to file this brief, and one of the parties having refused to give such permission, the *amicus curiae* hereby respectfully moves this Court for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37(3)(b).

This motion is made as one document with the brief sought to be filed, and is submitted within the time allowed for filing an *amicus curiae* brief in this matter.

The nature of *amicus curiae*, Richard Jones', interest in offering the within brief is to present relevant statistical proof and argument to this Court that is not found in any Federal Circuit Court of Appeals publication of cases relating to sex offender registration to date, and is more fully set forth beginning on page 1 of the within brief with the section entitled, **INTEREST OF THE AMICUS CURIAE**, pursuant to Supreme Court Rule 37(5).

Dated this 31 day of July, 2002.

QUESTIONS PRESENTED

1. Whether fallacious premises that are proven inaccurate by statistical facts should be deemed legitimate justification for enacting legislation that decreases public safety and violates the Constitutional prohibition on Ex Post Facto laws?
2. Whether sex offender registration records that are kept confidential by law enforcement agencies in the performance of their duty, produce greater public safety than sex offender registration records that are made public?
3. Whether procedures that are excessive, based in fallacious statements that become adopted by a legislature, or are grounded in myth, should be implemented?
4. Will more of the total sexual abuse crimes be reported if victims of family members, intimates, or acquaintances know that the perpetrator will (a) lose their job? (b) receive treatment? (c) Go to jail? (d) have their name, photo, and address disclosed to the public on the Internet?
5. Whether public disclosure of sex offender registration information diminishes public safety below that of what occurs from confidential disclosure of the information to police agencies?
6. Is public safety reduced when per capita reporting of sexual abuse decreases?
7. Does an irrational application of onerous sex offender registration procedures which undermines public safety, make the effect of the law so punitive as to violate the Ex Post Facto prohibition and Double Jeopardy clause of the Constitution?

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Utah Code Annotated: UCA 77-27-21.5	3, 23

INTEREST OF THE AMICUS CURIAE

Interest is in presenting relevant statistical proof and argument to this Court that is not found in Federal Circuit Court of Appeals publications to date relating to sex offender registration[1]. Statistical proof begins with research on sex offender recidivism (*Hanson, R. K., & Bussiere, M. T., (1998)*) that was presented by Dr. Hanson at a seminar at the Utah Bar Association in June, 1999. An article summarized the statistical significance of Dr. Hanson's work, and encouraged sex offenders to seek treatment in order to lower their risk to re-offend (*Jones, R. W. (1999)*). The important point proven by Dr. Hanson's statistical research is that the mere identification of sex offenders is correlated with a minimum of at least 60% of them never re-offending in a lifetime. Offenders hidden in the community are perpetrating the vast majority of sexual offenses. A concept used by Washington state, can vastly reduce victimization from sexual abuse by encouraging victims, and families that otherwise may not report, to come forward on condition that the offender will receive community supervised treatment and the family will not be punished by losing a breadwinner[2]. Clinical studies and interview polls show that most victims have an aversion to reporting sexual abuse, based in social and family pressure, as well as a tendency to want treatment more than punishment for the perpetrator.

Sex offender registration methods in Utah evolved from confidential information available only to law

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[1] Contributors other than the *amicus curiae* to preparation or submission of this brief: Larry Hillman $100. Mark Drabner donated time and effort in printing this brief. All of the donors reside in Salt Lake County, Utah. Two counsel of parties in this matter have been contacted: Verne Rupright, counsel for Jon Doe II, and indirectly with John G. Roberts, Jr., counsel for Glen G. Godfrey, et al, who informed that "the state is not going to consent to [t]his filing of an *amicus* brief".

[2] A model is employed in Washington State. The model is analyzed for effectiveness, and recommended. *Berliner, L., Schram, D., et al., (1995)*

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enforcement, to public disclosure. *Amicus curiae* Jones observed the aversive impact of public disclosure on his wife, children, and several friends in his support group. One close friend committed suicide. Vince may have done so because of the commitment that he shared that he was more likely to jump out of an airplane without a parachute than to re-offend. Vince's rip chord was a chain wrapped around his neck (August, 2001). *Amicus curiae* realized that onerous sex offender registration methods not only contribute to lower reporting of sexual abuse by families and friends, but also contribute to negative risk factors, including the inability to remain employed[3]. Internet public disclosure and other onerous sex offender registration laws are unconstitutional because they are not rationally connected to the good purpose of public safety (*Kennedy v. Mendoza-Martinez (1963)*), actually reduce public safety by deterring families and victims from reporting, and by increasing risk factors.

When reviewing the requirement in Rule 37(5) for the *amicus curiae* to set out their interest, we wondered if it was relevant as long as the brief contains factual information that will help this Court. After considerable pain in relating *amicus curiae* Jones' interest, we recognize high relevancy. Jones is a convicted and rehabilitated sex offender who very much wants to help end cycles of abuse in our society. He believes it is his duty is help because of his experiences. Interest comes from that duty, and because of insights that *amicus curiae* have. One thing that has made our Nation great is that privacy interests have been parallel to government interests. Here is an example of where assumption, that there is a great disparity between government and private interests, has resulted in onerous legislation that is irrationally connected to public safety.

[3] *Quinsey, V.L., et al (1995)* "report... the most important need at present is the identification and evaluation of dynamic predictors,... as situational predictors [including such things as gaining or losing employment]"

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This has resulted in punitive violation of Double Jeopardy and the prohibition on Ex Post Facto Laws. Only this Court can stop the violations by upholding constitutional protections against an oppressive majority motivated by fear and myths that do not apply to most sex offenders.

SUMMARY OF THE PROOF AND ARGUMENT

Sex offender registration laws have historically been enacted to promote the non-punitive purpose of public safety. The original statutes often contain an unambiguous statement of this "good governmental purpose", which seldom, if ever, changes in subsequent amendments to the original version of the law. While the alternative purpose for such amendments has not changed, many amendments to sex offender registry laws have added increasingly onerous methods that exceed the basic confidentiality in identification provisions of the original statute, and may change the purpose.

Lawmakers have assumed that identification of sex offenders may lead to better public safety by "perhaps... deterring them and others from perpetrating sex crimes" (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)), and, according to Utah's sex offender registry law, by aiding investigation and apprehension (*UCA 77-27-21.5(2)*) [unchanged in all amendments]. Scientific Research has been conducted to test these assumptions, and now clearly proves that while the basic confidentiality in identification provisions of original statutes, strongly serves public safety (*Hanson, R. K., & Bussiere, M. T., (1998)*), onerous methods that exceed confidentiality, result in reduced public safety and a lower percentage of sexual abuse reporting.

> "The criminal justice response to convicted sex offenders has been marked by uncertainty about how to achieve desired societal goals, whether it involves punishing criminals or preventing reoffenses... there is widespread belief that **punishment as a sole sanction deters certain**

victims from reporting and cooperating with criminal prosecution, especially where the offender is known or is a relative to the victim. In cases of incest there may be negative consequences to the victim if the offender is incarcerated and the family loses the economic support". (*Berliner, L., Schram, D., et al., (1995), pg 487 & 488*)

"Reporting of sexual abuse increased significantly in the late 1980s and the early 1990s. **In recent years**, however, **there has been a substantial decline in reports to child abuse authorities** (Jones & Finkelhor (2001). **A majority of states have seen decreases of up to 30% since 1994**". (*Berliner, L., & Elliott, D. (2002)*)[4].

The connection is analyzed between the public safety and excessive methods in sex offender registration statutes that do not take into account risk assessment or the negative impact of onerous procedures. Three of the factors assessing

[4] (Jones & Finkelhor, (2001)). "A majority of states have seen decreases of up to 30% since 1994. The reasons for this change are unclear..." (Berliner, L., & Elliott, D. (2002). Herein we respectfully submit that the reasons for the decline of reporting of sexual abuse are not unclear at all. Statistical proof presented here shows that up to 97% of all sexual abuse goes unreported. Calculations of actual reporting in the past have been as low as one in 153 victims. If the amount of abuse is exponentially greater than the small amount of reporting, then what public safety connected phenomenon has come into play in recent years that could reduce the already small amount of reporting by another 30%? Deductive logic yields the clearest answer when one frames the scientific and historical facts into premises. The majority of Victims and families are reluctant to report sexual abuse that has been perpetrated by someone that they know, unless they believe that the perpetrator will receive help in treatment, and not be unduly punished. Most sexual abuse is perpetrated by someone that the victim knows. Onerous sex offender registration methods are viewed as unduly punishing sex offenders. Therefore, victims and families are more reluctant to report sexual abuse than they were prior to the time that onerous sex offender registration methods began to be used. Excessive sex offender registration methods have a high deterrent effect upon reporting of sexual abuse, thereby diminishing public safety, and propelling the cycle of abuse into future generations.

whether a statute is so punitive in effect that it violates the prohibition on Ex Post Facto laws (*Kenneúy v. Mendoza-Martinez (1963)*), are re-visited in light of statistical proof. Alaska's sex offender statute and the amendment history of Utah's original 1987 sex offender registration law, are placed in context to show that despite their besf intentions, both the Federal 10th Circuit Court of Appeals and the Federal District Court for Utah, incorrectly believed that public safety is served by onerous sex offender registration methods (*Femedeer v Haun (1999)* 35 F. Supp.2d) (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)).

Applying the scientific proof to the 3 *Mendoza-Martinez* factors conclusively shows that: (1) sex offender registration laws that include Internet disclosure and other onerous methods, violate Ex Post Facto prohibition and the Double Jeopardy clause. (2) Onerous sex offender registration methods deter reporting of sexual abuse, and thereby reduce public safety, apprehension, and the effectiveness of investigation.

It is asserted that many more victims and family members will come forward to report sexual abuse if they believe that the offender will receive treatment and the family members and perpetrator will not be arbitrarily punished with procedures implemented after the report, or once treatment is completed. Many more victims may come forward if offenders who are bread winners are afforded supervised work release while they take treatment, and have their sex offender registration information kept confidential and available only to police. Many more victims will undoubtedly come forward to report if this Court affirms that ex post facto and Double Jeopardy provisions are violated when state laws are implemented that impose changes to sex offender registration requirements, statutes of limitations, and expungement provisions, that did not exist at the time the offense occurred. Until the above measures are taken to

encourage victims to come forward with reports on sexual abuse, the **vast majority of sexual abuse** will continue to **go unreported**[5], and public safety will not be rationally connected to sex offender registration and other laws. Such laws stand as excessive, because of their negative impact on reporting of sexual abuse. Until the negative impact on reporting (and public safety) is reversed, the *Mendoza-Martinez* factors of Excessiveness and Irrational Connection to Alternative Purpose will weigh for Punishment and Violation of Ex Post Facto and Double Jeopardy.

We respectfully conclude and pray that this Court Order that sex offender registration laws, and amendments to statutes, that require less confidentiality and/or more frequent or longer registration than the statue(s) previously in effect, violate Double Jeopardy and ex post facto provisions, and do not apply to convictions which occurred prior to their respective enactment dates.

We also urge and pray that this Court Declare all statutes that require public disclosure of sex offender registration information on the Internet, to be contrary to the legitimate government purpose of public safety, and Remand all statutes permitting public disclosure (except for non-Internet tier 3 disclosure regarding high risk offenders as per the current New Jersey sex offender registration statute) back to the various states for implementation of sex offender intervention measures that promote public safety by encouraging victims to report sexual abuse, and perpetrators to identify themselves and seek treatment.

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[5] "only 16 percent of rapes are reported to law enforcement" (Rape in America: A Report to the Nation (1992), The National Victim Center, and the Crime Victims Research and Treatment Center), "One in three girls and one on five boys will be sexually abused by age 18" (Salt Lake Office of Guardian Ad Litem (1998)), "78% of teenage sexual assault victims do not tell their parents about the incident" (Robin Warshaw (1988), I Never Called it Rape).

ARGUMENT BASED ON SCIENTIFIC FACTS

I. IDENTIFICATION OF SEX OFFENDERS SUBSTANTIALLY REDUCES RECIDIVISM RATES OF THE SEX OFFENDERS IDENTIFIED.

Identification of sex offenders drastically reduces their risk to re-offend, and leads to treatment, which further dramatically reduces the risk to re-offend. Statistical proof shows that 60% of sex offenders that become identified never re-offend in a lifetime, regardless of whether or not disposition of their case results in incarceration (*Hanson, R. K., & Bussiere, M. T., (1998)*) (*Jones, R. W. (1999)*) As treatment has become more common for sex offenders, the percentage that do not re-offend has increased. In a recent statistical study, the average sexual recidivism rate was 18% after 5 years, 22% after 10 years, 26% after 15 years, about 35% after 23 years, after which no further re-offenses occur (*Hanson, R. K., & Thornton, D. (2000)*). More recent statistical proof shows that up to 70% of sex offenders that become identified never re-offend in a lifetime[6]. The recent results showing that more sex offenders do not re-offend, are consistent with the fact that the older studies include a higher percent of samples where treatment had not been completed. Clearly this statistical proof dispels "the myth that once a sex offender, always a sex offender" (*Jones, R. W. (1999)*), and logically leads to the conclusion at the heading of this section, that "identification of sex offenders substantially reduces recidivism rates of the sex offenders identified".

A graph summarizing the recidivism base rate that is statistically shown by Dr. Hanson, was provided by him at the June 1999 Utah Bar Association seminar, where Dr.

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[6] "Current treatments...reductions in ...sexual recidivism (from 17.4 to 9.9%)", and that those who complete treatment have lower recidivism rates than those who do not (*Hanson, R. K. et al. (2002)*).

Hanson gave *amicus curiae* permission to reproduce it. The **graph is reproduced in the appendix on the last page** of this brief. A recent summary by Dr. Hanson of the statistical proofs shown in the appendix graph states:

> "it is useful to consider the expected recidivism rate for the average sex offender-the recidivism base rate. Contrary to common opinion, the observed recidivism rate of sexual offenders is relatively low… only 13.4% committed a new sexual offense within 4 to 5 years (Hansen & Bussiere, 1998)… we know that the observed recidivism rates for sexual offenses can increase to 30 to 40% as the follow-up period extends over 20 years… even with long follow-up periods and thorough searches, studies rarely find sex-offense recidivism rates greater than 40%. Any recidivism is troubling, but the available evidence does not support the popular belief that sexual offenders inevitably reoffend." (*Hanson, R. K. (2000)*)

However, the **vast majority of sexual crimes go unreported** (*Small, J.A. (1999)*)[7]. This huge number of unreported sexual assaults is perpetrated by offenders who remain undetected in the community while creating more and more victims. One study found that only 2% of victims of incest report sexual abuse, and only 6% of victims of non

[7] The following is found in *Small, J.A. (1999)* "statistics indicate that one in five children will be the victim of a sexual offense before the age of eighteen"…25% of adolescent girls and 12% of high school boys reported that they had been sexually or physically abused (Tamar Lewin) Sexual Abuse tied to 1 in 4 Girls in Teens, N.Y. Times, Oct 1 1997 at A24 (citing Commonwealth Fund study and Alan Guttmacher Institute study)" Freeman-Longo, The Sex Offender [states]…one in four girls and one in six boys will be victimized before age 18. See Lawrence A. Greenfeld, Bureau of Justice Statistics. In 1995, there was one violent sex offense reported for each 625 United States citizens (Greenfeld). Note that 1 per 625 reported and 1 per 4 occurred means only .64% of all abuse becomes reported. That is the same as 1 sex offense report per 153 cases of sexual abuse (excluding multiple events).

family members, report (*Russell, D. E. H. (1986)*). With the higher percentage of sexual abuse occurring within families, the average may be 3% of victims that report[8]. Therefore, when investigating new cases of sexual abuse, **it is the unidentified offender population that is creating the vast majority of new sexual offenses**, and investigation of sex offenders who have previously been identified does little to help apprehend unidentified offenders.

The hypothesis that excessive public disclosure of sex offender registration information, and more frequent and extended registration periods, may assist with apprehension of new perpetrators and investigation of sexual abuse cases, may have played a part in a national proliferation of amendments to sex offender registration laws *Small, J.A. (1999)* [9]. Such amendments include substitution of confidentiality requirements for public Internet disclosure[10].

[8] Adult women were questioned if they had been sexually abused at any time in their lives. Less than 42% who responded to the poll had told a close friend or relative within one year, 21% told someone after one year had passed, while only 3% had reported to authorities. 36% of those who had been sexually abused, disclosed that they had never told anyone until questioned in the poll (*Los Angeles Times poll (July 1998)*). Calculating from the Times poll, for every 3 victims that report to police, there are another 97 victims who do not, 36 of which virtually never tell anyone. Friends who hear about the abuse do not report to police, except where the report is counted among the 3% reported.

[9] *Small, J.A. (1999)* pg 1452 "Reacting to public outrage and fear… legislatures hurried to craft far-reaching laws targeting all sex offenders…these hastily enacted statutes are fraught with significant problems… onerous provisions applicable to thousands of Americans…" These laws reach innocent members of the sex offenders family. Pg 1456 "A frequently raised argument in favor of SORAs is that sex offenders have high recidivism rates…it is important to realize that sex offenders in general are not more likely than other criminals to reoffend (Scheingold et al, supra note 14, at 812)… 'data do not suggest that sexually violent crimes are increasing at a rate faster than other types of crime'"

[10] *Small, J.A. (1999)* pg 1462 & 3 "The type of protection offered by this service [CD ROM database of registered sex offenders available to the

II. ALL WHO QUALIFY FOR EX POST FACTO RELIEF ARE LOW RISK, AND RE-OFFENSES ARE SUBJECT TO NEW STATUTES ANYWAY. THE CLEAREST STATISTICAL PROOF SHOWS THAT SEX OFFENDERS WHO HAVE NOT RE-OFFENDED WITHIN 6 YEARS OF RELEASE TO THE COMMUNITY, HAVE VERY LOW RECIDIVISM RATES AND AFTER 23 YEARS WILL NEVER RE-OFFEND DURING THEIR LIFETIMES.

In the foregoing section I of this brief, the **clearest statistical proof** is presented that shows that a minimum of 60% of sex offenders never re-offend in a lifetime, from the point that they are identified (*Hanson, R. K., & Bussiere, M. T., (1998)*). More recent studies using increasingly larger sample sizes show proof that the percentage of identified sex offenders that never re-offend is on the increase (approaching 70%), (*Hanson, R. K., & Thornton, D. (2000)*). The improvement in recidivism rates of the recent research may be due to increased availability of therapy to identified sex offenders. Completion of treatment has independently been shown to significantly reduce recidivism (*Hanson, R. K. et al, (2002)*). Therefore, the earlier studies that show only 60% of identified sex offenders never re-offend, will be used here as conservative and **conclusive proof** that a minimum of sixty percent of all identified sex offenders pose no risk to society. It may be difficult to determine which members of the

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public] is questionable; although it does provide information to the community, it seems to be geared more toward sensationalism than a reasoned use of information" which is clearly irrationally connected to public safety. pg 1465 "lists can contain persons convicted for conduct that has been decriminalized"... who committed crimes so long ago that they can no longer be considered a threat" Also note that Hanson's statistics show 0% threat or risk after 23 years. In this context, lifetime registration makes no sense for public safety and is punitive when no public safety concern exists. A 5 year registration period is long enough for most risk categories (see Hanson)

identified group are among the 60% who will not re-offend at the point of their release to the community. However, the time that has passed since release to the community of those who qualify for ex post facto & Double Jeopardy relief from new laws and amendments regarding sex offender registry, places them in low risk or no risk categories. Most of the sex offenders who were convicted and released before the 1994 Alaska sex offender statute was enacted, remain free with little or no risk to re-offend. Those among that group who have re-offended are now subject to the new laws, and are no longer eligible for Ex Post Facto consideration anyway.

A close look at the graph found in the Appendix on the last page of this brief, shows three striking statistical scientific facts that cannot be refuted.

1. After thousands of sex offenders have been tracked for over 23 years (*Hanson, R. K., & Bussiere, M. T., (1998)*) (*Hanson, R. K., & Thornton, D. (2000)*) there are absolutely no offenders left in the group who will re-offend among those who have not re-offended by that time. After the 23 year point, all remaining offenders in the group pose no risk to the community. The absolute flattening of the curve on the graph scientifically proves that the myth that "once a sex offender, always a sex offender" is a fallacy (*Jones, R. W. (1999)*). Although it is impossible to subjectively separate the 60% who will not re-offend from the 40% who will at the point of release to the community, after 23 years those that remain in the community will never re-offend, and likely were low risk from the first day of their release to the community two decades earlier.
2. After 6 years the graph shows that more than 13 out of every 40 who will re-offend, has already been re-arrested and made subject to newly enacted laws.
3. The graph **conclusively proves** that in the instant case, John Doe I, and John Doe II, who plead nolo contendere in 1984 and 1985, and were released in 1990, represent little or no risk to the community regardless of Ex

Post Facto and Double Jeopardy considerations. John Doe I has been determined by a court to "have been successfully rehabilitated"... based in part on "psychiatric evaluations concluding that Doe I has 'a very low risk of re-offending' and is 'not a pedophile'" John Doe II completed a sex offender treatment program (*Doe I v. Otte (2001)*). This constitutes the **clearest proof** that any sanction placed upon them by the State that goes beyond 23 years from when they were released to the community, constitutes punishment. Each of them have been released to the community for 17 years at this point in time, and their pleas of nolo contendere occurred two decades ago. Their base line recidivism risk has been significantly reduced by therapy and psychiatric evaluation. The circumstances of the instant case demand that any application of the Alaska sex offender registration statute to them and persons similarly situated, constitutes punishment, because when there is no risk to re-offend, there is no public safety to protect, and enforcement of the law becomes irrational.

This goes to the excessiveness arguments presented later in this brief. All identified sex offenders that have spent time in the community become subject to newly enacted amendments to sex offender registration statutes, and therefore have Ex Post Facto and Double Jeopardy issues based in the **fact that their statistical risk to re-offend diminishes faster than the jurisdiction of new sanctions**. Sanctions like those contained in the Alaska sex offender registration law can not be anything but punitive for the Respondents in the instant case if they represent no statistical risk in the community after 17 years, with treatment. Indeed, the respondents may have represented no risk to the community from the day of their release, but subjective measures could not make that determination 17 years ago.

In following sections of this brief, a more striking element of punishment resulting from excessive sex offender

registration methods is presented to this Court: **Excessive methods** of sex offender registration, **including public disclosure on the Internet, are irrationally connected to the intended government purpose of public safety. There has been statistically as much as 30% less reporting of sexual offenses since the 1994 enactment of the Alaska sex offender registration act**[11].These statistical facts have never

[11] Information found in *Lawrence A. Greenfeld (1997)* "The number **reported** by victims age 12 or older in 1995 declined significantly from 1993: 1993 – 1 violent sex offense for every 435 residents. 1995 – 1 violent sex offense for every 625 residents... in 1995 the number of forcible rapes **reported** to the police nationwide was 97,460, the lowest total since 1989... The highest rate of forcible rape recorded by law enforcement... was in 1992 (84 per 100,000 women)... By 1995 the rate had decreased over 14%" This may be due to new laws and amendments that deter **reporting**. Pg v. "per capita rate of arrest was 50.3 per 100,000 residents in both 1983 and 1995, remaining unchanged even though the rate of reporting went down. Also on pg 8 "The per capita rate of arrest in 1995, 50.3 per 100,000 residents, is the same as the arrest rate in 1983". Note that the per capita arrest rate for sex offenses has been constant at 50.3 per 100,000 residents, although reporting of sex offenses is decreasing. "new questions and revised procedures were phased in from January 1992 through June 1993... Since July 1993, the redesigned methods have been used for the entire national sample... the new questionnaire would produce estimated rates of rape and sexual assault that were about 4 times [400%] higher than previously measured" pg 1. Therefore, statistics prior to 1993 are not comparable. "Victim and offender are likely to have had a prior relationship as family members. Victims of rape and sexual assault report that in nearly 3 out of 4 incidents, the offender was not a stranger" pg iii "sexual assaults reported by victims in the preliminary estimates for 1995 were significantly below the number of such offenses estimated for 1993... offenses experienced by victims is estimated to have dropped by a quarter and the per capita rate of rape and sexual assault to have dropped 30%... 1 rape/sexual assault victimization for every 435 persons...The most common reason given by victims... **for reporting** the crime to the police was to prevent further crimes by the offender against them... **for not reporting** the crime to the police was that it was considered a personal matter." Pg 2 Note that victims tend to report for prevention, not for enforcement. "3 out of 4 [1993 reported] rape/sexual assault victimizations involved offenders...with whom the victim had a prior relationship as a family member, intimate, or acquaintance." Pg 4 "For nearly 90% of the

been brought to the attention of any other court. *Mendoza-Martinez* standards that punishment exists if a statute is not rationally connected to it's alternative purpose, now tip to show violation of Ex Post Facto and Double Jeopardy. Excessiveness standards also are strongly weighted to a conclusion of punishment in the instant case, especially in light of the irrational connection to public safety, and the punishment meted out to the respondents, who pose no further risk to society.

III. EXCESSIVE PROCEDURES, INCLUDING ONEROUS SEX OFFENDER REGISTRATION METHODS, LEAD TO REDUCTION OF REPORTING OF SEXUAL ABUSE, RESULTING IN LESS IDENTIFICATION OF SEX OFFENDERS AND DECREASED PUBLIC SAFETY.

The hypothesis, that onerous procedures may assist public safety, has failed to be born out by statistical research. Research shows that victims become less likely to report sexual abuse as sex offender registration methods and punishment of sexual offenses become more onerous in the view of the victims themselves (*Berliner, L., & Elliott, D. (2002)*)[12]. As sex offender registration methods begin to

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youngest victims of rape, those younger than 12, the offender was someone known to them... family members victimized 43% of these young victims – about 4 times the proportion found among victims age 30 or older (11%)". Pg 4 "Sexual assaulters were about 3 times as likely as all violent offenders and twice as likely as rapists to report that the victim had been a member of their family. For 1 in 4 imprisoned sexual assaulters, the victim had been their own child or stepchild." Pgs 24 & 25.

[12] The following is found in *Berliner, L., & Elliott, D. (2002)* pg 58 "fewer than half of victims tell anyone at the time of the abuse, and a large percentage never reveal the victimization until asked for research purposes (Finkelhor et al., 1990)...only 6% to 12% of cases are reported to authorities (Elliott, 1993; Russell, 1984, Saunders et al., 1999)... Overall, in 45% to 75% of all cases that come to the attention of authorities, the precipitating event is something other than the child's

exceed the legitimate purpose of identifying offenders to police agencies in the line of their duty, the degree of denial of sex abuse increases within families and the community (*Berliner, L., & Elliott, D. (2002)*)[13]. This results in more perpetrators remaining unidentified. Perpetrators who are not identified, do not share the low risk of re-offending that has been proven for identified sex offenders . In fact, unreported perpetrators commit the vast majority of sexual crimes.

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report of abuse (Elliott & Briere , 1995)... Children are thought to recant either because they have been subjected to pressure from the offender or family members or because their report has produced negative consequences for themselves or others. Many children report fears about telling or regret the disclosure because of the outcome (Sauzier, 1989)...Almost all children believe that telling is the right thing to do to stop abuse and to receive help (Berliner & Conte, 1995).

[13] The following is found in *Berliner, L., & Elliott, D. (2002)* Child abuse figures vary by state definitions...Currently, the best mechanism for determining the scope of child sexual abuse is through retrospective surveys of adult non-clinical populations. Such surveys show considerable variability...Finkelhor (1994) ...concluded that at least 20% to 25% of women and from 5% to 15% of men experience contact sexual abuse. Most studies...find similar percentages...impact of trauma on memory suggests that estimates of abuse rates based on self reports of adults may underestimate its prevalence...adults with documented childhood sexual abuse histories found that more than 30% of the respondents did not report those early experiences when questioned (Widom & Morris, 1997; Williams, 1994)". pg 56 The percentages of reported related and unrelated perpetrators were similar but different between clinical studies and general population surveys: "strangers account for a relatively small proportion (5%-15%) with the remainder of cases involving individuals known to the child or family. In clinical samples, parent figures comprised between a quarter and a third of the offenders and all relatives about one half (e.g. Elliot & Briere, 1994; Gomes-Schwartz, Horowitz & Cardarelli, 1990). Based on general population surveys, abuse by parent figures (parent and stepparents) constitutes between 6% and 16% of all cases, and abuse by relative comprises more than one third of cases"]

Public safety is diminished by excessive sex offender registration methods, including disclosure on the Internet. This is consistent with the findings of researchers in the area of why sexual abuse is often not reported. "[I]s it possible that more victims would come forward if they felt the offender would receive treatment rather than incarceration? Does the availability of treatment make it more likely that offenders would confess rather than deny their offenses..." (*Murphy, W.D., & Smith, T.A., (1996)*). "[I]n many cases the actual victims often desire that one result of prosecution will be supervised treatment...This is particularly true when the offender is related or known to the victim or family, which occurs in the majority of cases where children are the victims. A criminal-justice response that does not include treatment opportunities for at least some sex offenders may undermine victim cooperation with prosecution" (*NCMEC (1998)* (pg 2 of 15))[14].

[14] *Berliner, L., (1996)* "some courts ... contend that such laws fail to increase community safety, the ostensible goal of the laws. It is even suggested that community notification might increase risk of reoffense... Fortunately, the state of Washington incorporates evaluation into sex offender legislation and some data are available describing the effects of the law...raise the question of community responsibility with regard to certain criminals...Does making citizens aware of their presence in a formal way make a difference...is it helpful or does it make matters worse?" *Warshaw, R. (1988). Salt Lake Office of Guardian Ad Litem (1998)* "One in three girls [33%] and one in five [20%] boys will be sexually abused by age 18" *National Victim Center and the Crime Victims Research and Treatment Center (1992)* : Rape in America: A Report to the Nation. "only 16% of rapes are reported to law enforcement". *Summit, R. (1983)* Explores the complex position in which the child victim is placed and describes why a child who has revealed sexual abuse may later deny it occurred... where the child has both the power to destroy the family and the responsibility to hold it together; the disclosure, which is often delayed , complicated and unconvincing; and ... a phase of retraction, where the enormous family pressures on the child may lead the child to decide that the only course left is to say that the abuse did not happen after all...Repeated Commentaries on this subject however have called for more creative thinking... and have emphasized the need for a social service response rather than stricter prosecution." (Daro, D., (1994) Prevention programs of childhood sexual abuse." The Future of Children. 4.2 (Summer/Fall), pp. 198-223) (Finkelhor, D. (1990) "New ideas for child sexual abuse prevention." In Oates, R.K. (eds). Understanding and Managing Child Sexual Abuse. Australia: Harcourt Brace Jovanovich Group Pty. Limited, pp 385-396.) (McCall, G. (1993) "Risk factors and sexual assault prevention." Journal of Interpersonal Violence, 8, pp. 277-295)... opportunity for present victims to reach out for help, thereby preventing continued abuse (Leventhal (1987) "Programs to prevent sexual abuse: What outcomes should be measured?" Child Abuse and Neglect 11, ppp. 169-171... children have greater difficulty in accepting the idea that abuse can occur at the hands of someone they know than at the hands of strangers (Finkelhor, D. and Strapko, N. (1992) "Sexual abuse prevention education: A review of evaluation studies." In Willis, D., Holder, E., et al., (eds). Child Abuse Prevention. New York: Wiley. Additional references: Berliner, L., & Conte, J. (1995) "The effects of disclosure and intervention on sexually abused children." Child Abuse and Neglect. 19, 371-384. Browne, A. & Finkelhor, D. (1986) "Impact of Child Sexual Abuse: A Review of the Research" In Donnelly, A.C. & Oates, K. (eds), Classic Papers in Child Abuse, Sage Publications, Thousand Oaks, CA, 2000 pps. 217-282. (Telling or not telling, parental reaction.)

The statistical and clinical research found in these footnotes, unquestionably provides the essential premise to the correlation that the more onerous the sex offender registration methods, the less people are likely to come forward to report sexual abuse. Logical deduction then leads to the conclusion that **public safety is actually diminished as a result of public disclosure of sex offender registration information on the Internet**[15]. In making recommendations

[15] Information found in *Small, J.A. (1999)* pg 1467 - 1469 Citing Doe v. Poritz, 662 A.2d 367, 376 (N.J. 1995) "This Court has no right to assume that the public will be punitive when the Legislature was not, that the public, instead of protecting itself as the laws intended, will attempt to destroy the lives of those subject to the laws...We do not perceive in this case a society clamoring for blood, demanding the names of previously-convicted sex offenders in order to further punish them..." The Law Review continues, "Although the court's opinion put great faith in the public, the years following Poritz have proven the court's assumption wrong. Many released offenders have been threatened or attacked.

for a sex offender policy, the National Center for Missing & Exploited Children recognized that victims base decisions to tell or not to tell upon perceptions related to sentencing [and punishment] practices, and that victim reporting is connected to public safety[16].

Relatives and friends of sex offenders may also be the victims of ostracism and public anger (footnote references Kimball, supra note 36 at 1201 describing ostracism of relatives)...Problems finding and maintaining employment, securing housing, and making and keeping social relationships are inevitable results of the stigma attached to the label 'sex offender,' – regardless of the severity of the crime or the likelihood that the individual will reoffend" pg 1480 & 1491 "It cannot be stressed enough that if the true purpose of notification statutes is community protection, notification should be limited to means which may actually provide protection to the community. Extensive notification such as the posting of photographs and home addresses on the Internet clearly goes beyond this purpose and exposes the individual to substantial burdens...It is unclear how much protection these sites provide ...pose a risk that individuals who get the information from the Internet will take it upon themselves to notify others, thus making notification an even less controlled process by taking it out of the government's hands...Internet notification exceeds the reasonable bounds...because the risk of improper notification and harms faced by the individual are very high."

[16] NCMEC advocates that "Victims should be encouraged to cooperate with the criminal-justice system, and unnecessary system-induced trauma on these victims should be minimized... Research must be a priority, focusing upon what works and what doesn't... Sentencing practices should be primarily focused on community safety. Victim wishes should be heard and considered; however, where they conflict with the community's interests, victim wishes should not be determinative. Treatment alternatives should be backed by suspended prison time... should be based on current research... in reducing recidivism. ...the primary concern is public safety... States should adopt a policy of zero tolerance regarding acts of harassment or vigilante violence directed at offenders. It must be each state's commitment to ensure that community notification regarding released offenders is handled responsibly and properly by citizens of the community" (NCMEC Sex-*Offender Policy Task Force and Endnotes (1998)* A Model State Sex-Offender Policy).

IV. DEDUCTIONS FROM STATISTICAL FACTS PROVE THAT PUBLIC SAFETY IS DIMINISHED BY ONEROUS SEX OFFENDER REGISTRATION METHODS, INCLUDING PUBLIC DISCLOSURE ON THE INTERNET. SUCH METHODS DEFEAT THE GOOD INTENDED ALTERNATIVE PURPOSE, CREATE ADDITIONAL PUNISHEMENT, AND VIOLATE THE PROHIBITION ON EX POST FACTO LAWS AS WELL AS THE DOUBLE JEOPARDY CLAUSE.

Statistical and historical facts are the basis of a simple yet **clear** conclusion that legislative evolution of sex offender registration procedures began with a strong positive correlation between the original procedures and public safety in many states that passed these registry laws in the late 1980s and early 1990s. However, in the instant case, in light of the scientific proof that onerous procedures, that deter victims form reporting sexual abuse, result in diminished public safety, Alaska passed its original 1994 sex offender registry statute with no such rational connection.

As sex offender registration acts (SORAs) **evolved from** strict confidentiality available only to police agencies, **to** public disclosure on the Internet, the earlier "[C]ourts that have addressed these issues almost uniformly have held that SORAs are not punitive" (*Small, J.A. (1999)* pg 1470). However, **no court has ever before considered** the scientific facts presented in this brief, which show that **SORAs which exceed** the legitimate government interest of confidential sex offender identification available only to law enforcement in performance of their duties, **are so irrationally connected** to public **safety that they undermine it**. Irrational connection to the purpose makes the law punitive, which violates the Ex Post Facto prohibition and Double Jeopardy clauses.

Ex Post Facto and Double Jeopardy consideration include the standards of the *Mendoza-Martinez* test for laws

that may be punitive in effect. The sixth of the seven tests being that of re-evaluating whether or not the legislative intent is rationally connected to the methods contained in the law. This brief provides strong evidence, including that there has been a 30% reduction in reporting of sexual abuse in recent years (*Greenfeld, L. A. (1997)*), that for onerous methods like Internet public disclosure, the legislative intent of public safety is not rationally connected to those means. Evidence for irrational connection to the alternative purpose may not have been presented to a court before with respect to sex offender registration laws. Never the less, now it is shown for the first time that the connection between the alternative purpose and the methods is punitive.

From the beginning of the legislative evolution of SORAs, the alternative purpose for sex offender registration statutes has been "public safety". Comparing Alaska and Utah's legislative evolution in instructive[17]. On making this comparison one can readily see that the public safety

[17] Comparison of Alaska and Utah sex offender registration statutes: 1. Internet public access is currently equal between Utah and Alaska's statutes, although Utah began with a rationally connected set of methods with public safety, and Alaska began immediately with irrationally connected means with public safety. 2. Many additional offenses were added to the original Alaska statute with effective date 6-5-99. These additions have analogous ex post facto punishment/retroactive impact to Utah's amendments which removed the guarantee of confidentiality with a series of amendments between April 1, 1992 and 1997, when another amendment to the statute made the information available to the public. The following year (1998) the Utah public information was made available on the Internet in order to save cost to the state in administering requests for information. 3. Utah's sex offender registration law does not require disclosure of an offender's place of employment, as the Alaska statute does. However, substantially all onerous methods are currently the same. The Utah internet public disclosure gives access to sex offender information to the world, including all consumers who are customers at all places of business, and thereby threatens employment of sex offenders virtually just as much as the Alaska Internet disclosure.

alternative purpose is not rationally connected to the Alaska statute, in the instant case (*AS 12.63.010, 12.63.020, 12.63.030, 12.63.100*). The legislative record shows that the 1994 SORA was enacted because, "The legislature finds that (1) sex offenders pose a high risk to reoffending after release from custody; (2) protecting the public from sex offenders is a primary government interest; (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety". 1994 Alaska Sess. Laws 41, sec 1. (*Russell(1997), 124 F.3d(9th Cir) at 1087*). Scientific proof now clearly shows that the premises which the Alaska legislature used to justify it's connection between the Alaska sex offender registry methods and public safety, are either fallacious or irrationally connected to the intended alternative purpose[18]:

1. The contention that "sex offenders pose a high risk to re-offending after release from custody", is fallacious. The scientific proof shows that in general sex offenders have a low recidivism rate compared with other offender types.
2. While, "protecting the public from sex offenders is a primary government interest", this purpose is not rationally connected to the procedures employed by the Alaska statute in the instant case. Scientific proof shows that public disclosure of sex offender registry information does not protect the public from sex offenders, but instead results in less reporting of sexual abuse by victims and thereby puts the public at greater risk from sex offenders who do not become identified. While sex offender registry information available only to police agencies in the performance of their duties may help protect the public from sex offenders, the public

[18] A reasonable legislator motivated solely by the aim of preventing additional sex offenses could not believe that the means chosen by the Department were justified by that aim (Femedeer v. Haun (1999)).

Internet disclosure of sex offender registry information employed in the instant case, results in fewer over all sex offenders becoming identified. (see footnotes at item 4)

3. While, "the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety", in the case of public disclosure of sex offender registry information, of offenders with little or no risk to re-offend, the privacy interests of the majority of sex offenders and public safety interests, are parallel and consistent. Public safety is served by keeping registry information of low risk offenders confidential by police agencies. (see footnotes at the end of item 4)

4. The contention that, "release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety", is generally fallacious. Release of sex offender registry information to the public has proven to be detrimental to public safety, especially when taken to the extreme on the world wide web as in the instant case (*Berliner, Lucy (2001)*)[19](*Small, J.A. (1999)*)[20].

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[19] Information found in *Berliner, Lucy (2001)* (see also [Henry, J. (1997) System intervention trauma to child abuse victims following disclosure. Journal of Interpersonal Violence, 12, 499-512] "Many sexual abuse victims, even in societies with highly developed child protection and mental health services, do not tell anyone at the time and even if they do, the abuse is rarely reported to authorities. Actions cannot be taken to protect children or the community or get help for children if the abuse is not known to caring adults or the authorities" (emphasis added) "Most sexually abused children are victimized by someone they are related to or someone they know". "Treatment is often complicated by the fact that families are in crisis or have other significant problems that interfere with a focus on the child's abuse reactions (homelessness)[unemployment]" ...it is important that alternative means of accomplishing the central goals of child protection and assistance are identified. The essential ingredients ...some mechanism for protecting the victims and other children in the community from identified offenders... informal ways of giving children support and the opportunity to resolve psychological symptoms. [The paradigm used by legislatures that more excessive methods of sex offender registration will help public safety, is fallacious. Confidential sex offender identification available only to law enforcement is consistent

Utah's intended alternative purpose is found unchanged from the original 1987 version through multiple amendments (*UCA 77-27-21.5,* Section (2)) that have significantly changed methodology and confidentiality. This stated alternative purpose, became more irrationally connected to the new methods with each amendment. "[O]ne can understand the pain and anguish that produced the laws... What one cannot do is allow passion, pain, and anger to cloud reason and judgment." (*Earl-Hubbard, M.L. (1996)*). While it is clear to many commentators that public safety is not rationally connected to the current law, other highly respected psychology professionals in prevention of sexual

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with the scientific proof by Hanson that most identified sex offenders never re-offend. Evidence seems to be strong that the new and workable paradigm to rationally connect public safety with sex offender registration, should be that confidential registration be maintained. Victims and offenders should be encouraged to report sexual abuse and seek therapy as a means to stop cycles of abuse] "Encouraging children to come forward ... is only worthwhile if the benefits of reporting outweigh the costs [or perceived benefits] of remaining silent". "The most important factor in creating a receptive climate for reporting is a societal context that condemns sexual abuse of children and does not take a punitive response toward children"

[20] *Small, J.A. (1999)* pg 1454 "to deal effectively with sex crimes, we must be careful not to make broad generalizations about sex offenders." pg 1455 "Contrary to the popularly held belief that sex crimes are usually committed by sinister strangers, 75% of all sexual assaults are perpetrated by offenders known to the victim". pg 1469 - 1470"Current notification schemes also may be flawed in significant ways that thwart the protective purposes of notification statutes" "Some critics argue that recent sex offender legislation fails to address the underlying problem of sex crimes by focusing only on ex post action (footnote references Greenberg, supra note 15, at 334 noting that underlying problem is not eliminated by use of penal sanctions) and offers communities a false sense of security... Notification about individuals who pose a minimal risk imposes a potentially high cost both on offende:' and on the community... overnotification creates a climate of fear and suspicion that fragments communities (footnote references Bedarf, supra note 118, at 907)

abuse, noted the irrational actions of legislators themselves in their rush to implement the laws. "[P]oliticians are passing laws that cater to the public's fear of sex crimes, and passing legislation based on emotions is not an appropriate avenue." (*Freeman-Longo, R. E. (1997)*). "Megan's Law was the product of politics and passion." (*Ruess, M. (1996)*).

In 1994, Alaska's Legislature based it's original sex offender registration law on irrational logic, fallacy, and emotion, which has forged punishment into law in the instant case, because there is no rational connection between public safety and the onerous methods used by Alaska. Perhaps no one could make this point more clear than Dr. Hanson, the very statistical research scientist that accumulated proof of the first premise announced in this brief, "that Identification of Sex Offenders Substantially Reduces Recidivism Rates of the Sex Offenders Identified".

> "it is worth considering Grove and Meehl's (1996) caution about the use of unverified clinical opinion, which they compare to the Inquisition's methods for identifying witches. 'All policy makers should know that a practitioner who claims not to need any statistical or experimental studies but relies solely on clinical experience as adequate justification, by that very claim is shown to be a nonscientifically minded person whose professional judgments are not to be trusted' (Grove & Meehl, 1996, p 320, [Psychology, Public Policy & Law, 2]). Not too long ago, the people who evaluate sexual offenders had little choice but to use unverified clinical opinion because the relevant research was unavailable. With recent advances, however, knowledgeable evaluators now have the potential of providing risk assessments worthy of serious consideration." (*Hanson, R. K. (2000)*)

Like Alaska, many states have based public disclosure amendments and laws since 1993 on subjective myths that

should now be replaced with scientific evidence in order to restore a rational connection between public safety and the law, and prevent further violations of the Constitution[21].

With this negative impact on public safety being the case for sex offender registration procedures that decrease confidentiality (including public disclosure on the Internet) and/or increase the frequency or period of reporting, we now re-visit the following three *Mendoza-Martinez* factors (*Kennedy v. Mendoza-Martinez (1963)*), (4) Promote traditional aims of punishment-retribution and deterrence. (6) Whether the "good purpose" [alternative purpose] is rationally connected to the consequences. (7) Excessiveness.

A. PROMOTE TRADITIONAL AIMS OF PUNISHMENT, RETRIBUTION AND DETERRENCE.

The empirical evidence presented earlier strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet. The deterrent affect on victims is as much or more than it is on offenders. With regard to Alaska and Utah's SORAs that currently require Internet disclosure, both courts that dealt with

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[21] The Alaska legislature passed its original sex offender registration law in 1994, containing onerous provisions, including public disclosure on the Internet and repeated reporting to police by registrants. Unlike many states, like Utah, who began with strict confidentiality of the information collected, Alaska's statute was irrationally connected to public safety from the beginning. The Alaska legislature then added amendments that made the onerous procedures applicable to additional crimes. Utah's original legislation was enacted in 1987. It's original requirement that the information collected be confidential and available only to police agencies in the performance of their duties, was clearly rationally connected to public safety. By April 1, 1992 the confidentiality provision had been completely removed. In 1997 information collected was made available by petition. In 1998, a further Utah amendment placed the information collected on the Internet. State Representative, Brian Allen, the sponsor of the legislation, justified this Internet public disclosure was needed to serve a new alternative purpose, to save the state money.

Alaska's statute (*Doe I v. Otte (2001)* 259 F.3d 979 (9th Cir)) (*Rowe, et al. v. Boteiho (1994)*) concluded that traditional aims of punishment and deterrence weigh in the direction of punishment. The 10th Circuit in the Utah case, found that this factor was inconclusive in it's weight for punishment, assuming that the disclosure seems to constitute punishment by creating public disclosure and ostracism (*Femedeer v Haun (2000)*, 227 F.3d 1244 (10th Cir)). The Utah Federal court (*Femedeer (1999)*) said, "retributive effects of the statute could **not be attributable to the government**", and therefore concluded that this test does not weigh in the direction of punishment. The observations of Utah's Federal Judge Kimball and of Alaska's Federal Court in *Rowe*, indicate the same impact of Internet disclosure on victims with their observations that the deterrent effects are displaced from the perpetrator. The Alaska Federal Court said, "The burdens placed directly on the perpetrator by the Registration Act are de minimis in this context… the only meaningful deterrence flowing directly from registration comes from modifying the conduct of the…public".

Both courts that dealt with Alaska's statute have determined that the deterrent factor weighs in the direction of punishment (support Ex Post treatment of Internet disclosure laws), while the courts dealing with Utah's statute had mixed opinions pointing to punishment by ostracism that can impact the public. With this consensus and the implications that such laws negatively impact victims, and are not hewn to promote the aim of public safety, we now move to the factor of connection between alternative purpose and methods.

B. WHETHER THE "GOOD PURPOSE" [ALTERNATIVE PURPOSE] IS RATIONALLY CONNECTED TO THE CONSEQUENCES.

Three of the above named court's treatment of this factor regarding the Alaska and Utah statutes, were cursory,

each court adopting the fallacy that Internet disclosure and other onerous methods must be rationally connected to public safety as long as public safety is a good purpose. Judge Kimball (*Femedeer (1999)*) on the other hand, recognized that a legislature's planned intention may not be the same as the impact of the law, and **combined this factor** of whether there is a rational connection to the alternative purpose, **with the factor of excessiveness** with respect to public safety. Judge Kimball concluded that these factors weigh in the direction of punishment (and support Ex Post treatment).

Empirical evidence presented earlier in this brief strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet, and the deterrent affect on reporting of sexual abuse makes the onerous methods employed by both Alaska and Utah's current SORAs, irrationally connected to the good government purpose of public safety. Taking this empirical evidence into account, all four of the above named courts would clearly weigh this illogical connection to public safety in the direction of punishment and support Ex Post treatment of Alaska and Utah's current sex offender registration laws.

C. EXCESSIVENESS:

Not only three of the four above named courts determined that Alaska and Utah's current SORAs employ excessive measures that constitute punishment and violate the Ex Post Facto prohibition, but "[w]ith only one exception, every sex offender registration and notification law that has been upheld by a federal court of appeals has tailored the provisions of the statute to the risk posed by the offender " (*Doe I v. Otte (2001)*), and "of the sex offender registration laws that have successfully overcome ex post facto challenges, none [except one case heard after *Kansas v Myers*] have …provided for unlimited public access to the registered sex offender information" (*Kansas v. Myers, 260*

Kan. 669, 923 P.2d 1024, 1041 (1996)). The 10th Circuit Court in its consideration of Utah's current SORA (*Femedeer v Haun (2000)*), is that solitary exception.

From the empirical evidence presented earlier in this brief, that strongly indicates that victims are deterred from reporting sexual abuse by public disclosure on the Internet, the conclusions of the above three courts are firmly grounded, that Alaska and Utah's SORAs are excessive with respect to the purpose of public safety, and that they violate the ex post facto prohibition of the Constitution. The 10th Circuit court's conclusion that "we do not think that Internet notification imposes excessive costs" (*Femedeer v Haun (2000)*), is shown by the empirical evidence to be in error.

In Utah, the very nature of converting the confidentiality requirement, contained in the original 1987 version of the Utah statute, into public disclosure on the internet, is excessive when considered in light of the scientific evidence that doing so diminishes public safety. The 1987 sex offender registration statute was hewn to the public safety purpose, and provided, Section (12), "**information collected** under this section **is confidential** under Chapter 2, Title 63, regarding information practices and is **available to law enforcement agencies only** in the performance of their duties".

The Federal District Court for Utah concluded that placing sex offender registry information on the Internet was excessive, and that "to the extent the statute is to be applied retroactively, **they** [safeguards 'to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect'] **are constitutionally required**" (*Femedeer (1999)*, quoting *Pataki*, 120 F.3d at 1262). The District Court concluded, "the legislature is not free from the constitutional requirement that the means selected be reasonably related to the statute's nonpunitive purpose of

preventing additional sex offenses, and the Department's intended course of action fails this prerequisite".

Perhaps, nowhere else has a court come so close to summarizing what the scientific facts now show, than Judge Dale Kimball did when he made the above conclusions regarding the *Mendoza-Martinez* factor of Excessiveness. Even without the scientific studies that are respectfully presented in this brief, Judge Kimball articulated the Constitutional requirement that the "means selected be reasonably related to the" alternative purpose of public safety by making the registry information available only to individuals *qualified* in promoting public safety.

CONCLUSION

This brief has respectfully appraised this Court of statistical research that has tested the premise that onerous methods in SORAs, including public disclosure, will aid public safety. The research proves that the premise is false. Public safety is diminished by sex offender registry methods **that exceed** making the information collected available ONLY to law enforcement agencies in the line of their duties.

Three *Mendoza-Martinez* factors have been re-visited in light of the statistical proof. **Deterrence**: Public disclosure and other onerous methods in SORAs deter victims from reporting, as well. **Rational connection to alternative purpose**: Onerous methods are irrational. Victim reporting has been reduced by 30%. Public safety is hurt rather than helped. **Excessiveness**: Most courts agree that the onerous methods are excessive. The statistical proof presented here shows that public safety is hurt by reduced victim reporting. There can no longer be any doubt that Internet disclosure of sex offender information weighs heavily as punishment under the *Mendoza-Martinez* standard. Sex offender registration laws that do not keep registry information confidential, especially laws that make the information available to the

public, including on the Internet, violate the ex post facto prohibition and the Double Jeopardy clause.

Therefore, both Alaska and Utah's SORAs are unconstitutional. Sex offenders convicted under a prior sex offender registration law or amendment that required the information collected to be available only to law enforcement agencies in the line of their duties, are not subject to later amendments to that law. In Utah, this means that sex offenders convicted prior to April 1, 1992, like *amicus curaie* Jones, are subject only to the provisions of the SORA in affect prior to that date.

Further, the broad implications from the scientific proof that such onerous registry disclosure methods actually diminish public safety, lead us to the conclusion that additional Constitutional protections, including Due Process, are violated by public disclosure of sex offender registration information. Internet exposure is more egregious than other methods, but any public disclosure of the information about low risk offenders undermines the fabric that is held together by the various threads of Constitutional rights. In order to affirm public confidence that this Court will not interpret the fabric of Constitutional protections in a manner which sacrifices public safety for punitive and ill conceived government purposes that are irrationally based, we respectfully urge that the United States Supreme Court Declare all statutes that require public disclosure of sex offender registration information on the Internet, to be contrary to the legitimate government purpose of public safety, and that the Court Remand all such statutes back to the various states for implementation of sex offender intervention measures that promote public safety by encouraging victims to report sexual abuse, and perpetrators to identify themselves and seek treatment.

Dated this 31 day of July, 2002.

Appendix

Sex Offense Recidivism